(1) Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MRO COMMUNICATIONS, INC.,
a Nevada corporation;
Petitioner,

v.

AMERICAN TELEPHONE &
TELEGRAPH COMPANY, now AT&T Corp.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Federal Communications Act require AT&T to provide the necessary 900 telephone call data in order for MRO to bill its 900 callers because such call data is ". . . in connection with" AT&T's "communications services" (i.e., AT&T's tariffed 900 transport services)?

2. Does the FCA require AT&T to provide as part of its tariffed 900 services the telephone call data that is necessary in order to bill for such calls?

PARTIES TO THE PROCEEDING

Petitioner

The parent company of Petitioner MRO Communications, Inc. ("MRO") is Bellatrix International, Inc., a corporation which has shares issued to the public.

Respondent

The respondent is AT&T Corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES vii

OPINIONS BELOW ix

JURISDICTION ix

STATUTORY PROVISIONS INVOLVED x

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 3

I. THE NINTH CIRCUIT'S DECISION IS CONTRARY TO THE FEDERAL COMMUNICATIONS COMMISSION'S DECISION IN IN AT&T DIAL-IT, 4 FCC RCD. NO 9, 3429 (1989), AND CONFLICTS WITH THE FEDERAL COMMUNICATIONS ACT ("FCA") SECTIONS 201-202, WHICH REQUIRES AT&T TO PROVIDE THE 900 TELEPHONE CALL DATA TO MRO BECAUSE IT IS ". . . IN CONNECTION WITH" AT&T'S

"COMMUNICATIONS SERVICES" (I.E., AT&T'S TARIFFED 900 TRANSPORT SERVICES) 3

II. BY HOLDING THAT MRO CANNOT RECOVER ITS DAMAGES UNDER THE FCA FOR AT&T'S REFUSAL TO PROVIDE THE 900 CALL DATA NEEDED TO BILL ITS CALLERS, THE NINTH CIRCUIT'S DECISION IS CONTRARY TO THE DECISION OF THIS COURT IN MAISLIN INDUSTRIES V. PRIMARY STEEL, 497 U.S. 116 (1990), AND ALSO CONTRARY TO SECTIONS 201-202 AND 206-207 OF THE FCA 8

III. THE NINTH CIRCUIT'S RULINGS WOULD ENABLE AT&T (THE NATION'S LARGEST COMMUNICATIONS COMMON CARRIER) BY NOT TARIFFING CERTAIN SERVICES (WHICH ARE "CONNECTED" TO AT&T'S TARIFFED "COMMUNICATIONS" SERVICES") TO PREVENT ANY OF AT&T'S TARIFFED COMMUNICATIONS SERVICES CUSTOMERS FROM UTILIZING SUCH TARIFFED SERVICES, UNLESS THEY AGREED TO AT&T'S CONTRACT TERMS 10

IV. THE NINTH CIRCUIT'S DECISION SUBSTANTIALLY AFFECTS A RULE OF NATIONAL IMPORTANCE; NAMELY, WHAT SERVICES ARE ". . . FOR OR IN CONNECTION WITH . . . COMMUNICATIONS SERVICES . . ." PURSUANT TO THE FCA, IN WHICH THERE IS AN OVERRIDING NEED FOR NATIONAL UNIFORMITY 11

CONCLUSION 11

APPENDIX

Appendix A
Ninth Circuit Opinion, 12/13/99 . . . . . 1a

Appendix B
District Court Order on Motion for Summary Judgment and to Dismiss Counterclaims, 11/3/98 . . . . . 20a

Appendix C
District Court Judgment, 11/3/98 . . . . . 53a

Appendix D
Ninth Circuit Order Denying Petition for Rehearing and for Rehearing En Banc, 2/4/2000 . . . . . 55a

Appendix E
Declaration of David L. Kahn in MRO's Opposition to AT&T's Motion for Summary Judgment and to Dismiss Counterclaims, 7/10/98 . . . . . 57a

Appendix F
Exhibit C to MRO's Answer and Counterclaims, 3/12/98 . . . . . 64a

TABLE OF CITED AUTHORITIES

CASES: **Page**

In the Matter of Competition in the Interstate Interexchange Marketplace, FCC Docket No. 90-132 (1992), FCC Rcd. No. 9 10

In re AT&T 900 Dial-It Servs. and Third Party Billing and Collection Servs., 4 F.C.C.R. 3429 (1989) 3, 5

Maislin Industries v. Primary Steel, 497 U.S. 116, 111 L.ed.2d 94, 110 S.Ct. 2759 (1990) 8, 9

McDonnell Douglas Corp. v. General Tel. Co. of Cal., 594 F.2d (9th Cir. 1979), cert. denied, 444 U.S. 839 (1979) 10

National Ass'n of Regulatory Utility Commissioners v. FCC, 880 F.2d 422 (D.C. Cir. 1989) 10

People of the State of California v. FCC, 905 F.2d 1217 (9th Cir. 1990) 10

STATUTES:

28 U.S.C. Section 1254(1) ix
28 U.S.C. Section 1291 2
28 U.S.C. Section 1331 2
28 U.S.C. Section 1332 2

28 U.S.C. Section 1333 2
47 U.S.C. Section 151 . . . . . x, 2
47 U.S.C. Section 201 9
47 U.S.C. Section 201(a) . . . . . x, 9
47 U.S.C. Section 201(b) . . . . . x, 9
47 U.S.C. Section 202 9
47 U.S.C. Section 202(a) x
47 U.S.C. Section 203(a) xi
47 U.S.C. Section 203(c) xi
47 U.S.C. Section 206 9
47 U.S.C. Section 207 9

FEDERAL RULES:

Fed.R.Civ.P. 54(b) 2

Petitioner MRO Communications, Inc. respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals in this Case.

OPINIONS BELOW

The Memorandum opinion of the United States Court of Appeals for the Ninth Circuit is officially unreported; however, it is published in full on the Internet by both LEXIS - NEXIS and WESTLAW, 1999 WL 1178965. A copy is included as Appendix ("App.") A at 1a. The Order of the United States District Court for the District of Nevada granting the Motion for Summary Judgment and the Motion to Dismiss is included as App. B at 20a, and Judgment on such Order is included as App. C at 53a.

JURISDICTION

The United States Court of Appeals issued its Memorandum opinion on December 13, 1999. On January 3, 2000 Petitioner filed a Petition for Rehearing and Petition for Rehearing En Banc which the United States Court of Appeals denied on February 4, 2000 (App. D at 55a). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

47 U.S.C. Section 151

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make it available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges. . .

47 U.S.C. Section 201(a)

It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefore . . .

47 U.S.C. Section 201(b)

All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . .

47 U.S.C. Section 202(a)

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any

particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47 U.S.C. Section 203(a)

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges . . .

47 U.S.C. Section 203(c)

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule . . .

STATEMENT OF THE CASE

A. Factual Background.

MRO Communications, Inc. ("MRO"), a Nevada corporation, operates as a service bureau for businesses that provide information and entertainment through pay-per-call programs on "900" telephone numbers, as well as providing its own information and entertainment on "900" telephone numbers.

After AT&T terminated billing services for MRO's 900 numbers, the U.S. District Court on September 1, 1995 ordered that MRO's existing 900 numbers provided by AT&T may be used by MRO with another carrier for purposes of arranging a new billing services agreement.

From October 1, 1995 through June 1997 AT&T provided MRO with tariffed transport services for MRO's 900 telephone numbers pursuant to the Federal Communications Act ("FCA"), i.e., AT&T transported calls from callers' phones to the 900 numbers at MRO's facility in Las Vegas. At the same time, AT&T provided to MRO's billing company, ITA, the necessary call data (e.g., date and duration of call and the calling telephone number) for each such call that AT&T transported so that ITA could bill each caller for its calls to MRO's 900 numbers.

For approximately three months (July 1997 to October 1997) AT&T failed to provide any legible, readable call data to MRO or to MRO's billing company (see Exhibit C to MRO's Answer and Counterclaims, App. F at 64a). These AT&T actions are the basis for MRO's Counterclaims in its Answer.

MRO requested leave to file an Amended Answer to add a Claim for Relief against AT&T for such violation of the FCA. For purposes of deciding AT&T's Motion to Dismiss MRO's Counterclaims, the lower court deemed that MRO's requests to file an Amended Answer were granted (App. A at 37a).

B. The Proceedings Below.

On February 6, 1998 AT&T filed a Complaint against MRO for allegedly unpaid tariffed transport services. On March 12, 1998 MRO filed its Answer and Counterclaims. On November 3, 1998 the District Judge entered an Order granting AT&T's Motion for Summary Judgment and to Dismiss MRO's Counterclaims (App. B at 20a). The Judgment on such Order was entered on November 3, 1998. MRO's Notice of Appeal was filed on November 30, 1998. The Memorandum opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the District Court was filed on December 13, 1999 (App. A at 1a) and MRO's Petition for Rehearing and Rehearing En Banc was denied February 4, 2000 (App. D at 55a).

The District Court had jurisdiction over the Federal Communications Act ("FCA") claims under 47 U.S.C. Section 151 et. seq. and 28 U.S.C. Sections 1331, 1332, and 1333. Jurisdiction in the Court of Appeals was under Fed.R.Civ.Pro. 54(b) and 28 U.S.C. Section 1291.

REASONS FOR GRANTING WRIT

I. THE NINTH CIRCUIT'S DECISION IS CONTRARY TO THE FEDERAL COMMUNICATIONS COMMISSION'S DECISION IN IN AT&T DIAL-IT, 4 FCC RCD. NO 9, 3429 (1989), AND CONFLICTS WITH THE FEDERAL COMMUNICATIONS ACT, ("FCA") SECTIONS 201-202, WHICH REQUIRES AT&T TO PROVIDE HE 900 TELEPHONE CALL DATA TO MRO BECAUSE IT IS ". . . IN CONNECTION WITH" AT&T'S "COMMUNICATIONS SERVICES" (I.E., AT&T'S TARIFFED 900 TRANSPORT SERVICES).

The Ninth Circuit's decision is contrary to the Federal Communications Commission's decision in In AT&T Dial-It, 4 FCC Rcd. No. 9, 3429 (1989) at 3432 where the FCC stated:

> A third party wishing to provide billing and collection services would require the LECs' name and address data bases to match calls to callers. AT&T notes that the Commission has required LECs to make call detail information available "on a reasonable basis". (Emphasis added.)

The Ninth Circuit's Memorandum entire discussion on this point is (App. A at 9a):

> MRO's extrapolation of some duty on AT&T's part to provide call records is not supported by

the language of the Tariff provisions[1] or the statute [FCA] to which MRO pointed.

In this connection, the Ninth Circuit overlooked the material point of fact that such call data is essential in order for MRO to be able to bill callers to MRO's 900 telephone numbers. An information provider ("IP") while purchasing 900 transport services from AT&T, cannot conduct its own billing, or arrange for billing services from a company other than AT&T, unless AT&T furnishes to the IP, or to the billing company, the calling telephone number, the date of the call, and the length of the call ("call data") (App. E at 63a).

---

[1] In fact, the plain language of Section 5.4.4 of AT&T's Tariff No. 1 does provide for call records (i.e., "information forwarding") as part of AT&T's tariffed 900 transport services. It states in part:

> 5.4.4 Optional Features - The following Optional Features are available with AT&T MultiQuest Service.
>
> A. Information forwarding-2 (INFO-2) - INFO 2 is an optional feature which provides caller number information to the called party. With this feature the terminating user may be provided with the caller's Calling Party Number (CPN) or Billing Number (BN). The subscriber may select the delivery of Information Indicator (II) Digits as an option under CPN/BN/II will be provided if selected and when provided by the LEC's on a call by call basis and will be delivered to the terminating user via the INFO-2 Call Setup message or Facility Acknowledge message.

The call data must be part of AT&T's 900 tariffed services if the IP is to be able to bill its 900 calls. If it is a matter of contract, then AT&T can refuse to contract with the IP, and the IP will be unable to bill its 900 calls. For such reasons, this call data is supposed to be provided by AT&T to MRO as part of AT&T's 900 tariffed transport services, because it is a "practice and/or regulation affecting such practice" which was required to be tariffed pursuant to the FCA §203(a) and §§201-202 because they are "for, or in connection with" AT&T's "communications services" (i.e., AT&T's 900 transport services).

The call data is the identical information that AT&T obtains while furnishing 900 tariffed transport services to MRO; which AT&T utilizes to determine MRO's 900 transport services charges (App. E at 63a).

The Ninth Circuit's Memorandum did not address this issue.

However, the district court stated (App. B at 39a):

> Moreover, the FCC has ruled that billing and collection services, which include the provision of call records, are controlled not by tariffs, but by outside contracts. AT&T Dial-It 900 Servs., 4 F.C.C.D. 3429, 3433-34.

But, in reaching this conclusion, the district court completely ignored MRO's Opposition (ER 351-355, App. E at 61a-63a); which explained (i) the standard under Dial-It for determining whether call data are part of tariffed transport services, and (ii) the facts why MRO's 900 services from AT&T result in AT&T's call data being part of AT&T's tariffed transport services to MRO under that standard. None

of those MRO undisputed facts (App. E at 61a-62a) were mentioned by the district court in its above quoted one sentence conclusion.

The Ninth Circuit's Memorandum did not address MRO's contention that pursuant to the FCA, the 900 call data (which is essential in order for MRO to be able to bill for its 900 calls) is part of AT&T's 900 tariffed services.

More specifically, MRO's Opening Brief (p. 31-33) quoted the FCC standard in Dial-It for determining whether call data is part of tariffed transport services (at 3431):

> The conclusion that Call Count service is an enhanced service follows from a functional consideration of what the service provides. A Call Count service sponsor/subscriber does not seek a transmission path from AT&T in order to provide e.g., an information service to his customers. Rather, the Call Count sponsor/ subscriber obtains that service only in order to obtain substantive information from AT&T, for example, how many callers have voted "yes" or "no." The provision of such information is not incidental to the provision of basic service by AT&T. Instead, provision of the non-telecommunications information is the essential service provided.
>
> Thus a Call Count subscriber does not obtain transmission service in order to facilitate his own enhanced service, but, rather, obtains "additional, different, or restructured information." 47 C.F.R. §64.702(a).

In this Case (unlike in Dial-It), it is undisputed that:

1. MRO did seek a transmission path from AT&T in order to provide an information service to MRO's customers (App. E at 61a);

2. MRO did not obtain AT&T's 900 transmission service "only in order to obtain substantive information from AT&T (App. E at 61a-62a); and

3. MRO obtained AT&T's 900 transport services to MRO's own facilities and equipment so that (i) MRO could utilize its facilities and equipment to provide the 900 caller with the information desired by such caller, and (ii) MRO would not have to obtain essential 900 transport services from another 900 carrier (App. E at 61a).

Thus, it is undisputed that in this Case AT&T's 900 transport services were essential to MRO so that MRO could provide on its own facilities and equipment the information desired by MRO's 900 caller (App. E at 61a).

In this Case (unlike in Dial-It), it is undisputed that:

1. AT&T's provision of such information (i.e., the telephone number called, and the date and duration of the call) is incidental to the provision of basic 900 transport service by AT&T (App. E at 61a);

2. There is no provision by AT&T of non-telecommunications information to MRO, let alone such information being "the essential service provided" to MRO (App. E at 62a);

3. MRO obtained AT&T's 900 transmission service in order to facilitate MRO's "own enhanced service"; i.e., billing and collection services to the 900 customer (App. E at 62a); and

4. MRO did not obtain "additional, different, or restructured information" from AT&T (App. E at 62a).

None of the above undisputed differentiating facts (presented by MRO in its Opposition to AT&T's Motion for Summary Judgment, App. E at 61a-62a) between Dial-It and this Case were even mentioned by the district court in its one sentence conclusion that Dial-It is controlling (App. B at 39a), or by the Ninth Circuit in its Memorandum (App. A at 1a).

Moreover, Dial-It, was not a case, such as here, where the 900 IP had to have the 900 call data in order to be able to bill its 900 calls.

Once again, the Ninth Circuit's Memorandum did not address this controlling issue.

II. BY HOLDING THAT MRO CANNOT RECOVER ITS DAMAGES UNDER THE FCA FOR AT&T'S REFUSAL TO PROVIDE THE 900 CALL DATA NEEDED TO BILL ITS CALLERS, THE NINTH CIRCUIT'S DECISION IS CONTRARY TO THE DECISION OF THIS COURT IN MAISLIN INDUSTRIES V. PRIMARY STEEL, 497 U.S. 116 (1990), AND ALSO CONTRARY TO SECTIONS 201-202 AND 206-207 OF THE FCA.

Under the "filed tariff" doctrine and §§206-207 of the FCA a customer can sue a carrier in at least three circumstances:

1. The customer overpaid the carrier under the terms of the tariff;

2. The tariff is unreasonable; 47 U.S.C. §§201-202 and 206-207; or

3. The tariff (or its application) is discriminatory. 47 U.S.C. §§201-202 and 206-207.

The case relied on by the Ninth Circuit (Maislin Industries v. Primary Steel, 497 U.S. 116, 111 L.ed.2d 94, 110 S.Ct. 2759 (1990)), affirms these principles.

In its First Counterclaim against AT&T, MRO is suing AT&T to "recover reparation[s]" in the words of Maislin, or damages for AT&T's violations of their Tariff and/or the FCA, as MRO is entitled to do under 47 U.S.C. §§ 206-207.

For the reasons stated above, AT&T's failure to provide MRO's 900 call detail violates the FCA (and § 5.4.4 of AT&T's Tariff No. 1). It also violates the unjust, unreasonable and discrimination provisions of the FCA (§§201-202) because MRO had good reason to believe that AT&T, by not providing 900 call detail records for MRO, had selectively discriminated against MRO, compared to other 900 transport services customers (App. E at 63a).

III. THE NINTH CIRCUIT'S RULINGS WOULD ENABLE AT&T (THE NATION'S LARGEST COMMUNICATIONS COMMON CARRIER) BY NOT TARIFFING CERTAIN SERVICES (WHICH ARE "CONNECTED" TO AT&T'S TARIFFED "COMMUNICATIONS" SERVICES") TO PREVENT ANY OF AT&T'S TARIFFED COMMUNICATIONS SERVICES CUSTOMERS FROM UTILIZING SUCH TARIFFED SERVICES, UNLESS THEY AGREED TO AT&T'S CONTRACT TERMS.

More specifically, under the Ninth Circuit's holding, if essential call data such as the calling telephone number, and date and length of call, were matters of mere contract between AT&T and the information provider ("IP"), as opposed to being a required tariffed service under the FCA, then AT&T could prevent any IP from being able to bill its 900 calls received through AT&T's tariffed 900 transport services by simply not agreeing to contract terms and conditions. This would give AT&T an even greater "monopoly leveraging" position (see In the Matter of Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, (1992) FCC Rcd. No. 9, p. 2677), in violation of §§201-202 of the FCA, than stated in the pending Petition for Writ of Certiorari No. 99-1480.

It is a basic tenet of statutory construction that in interpreting the meaning of the words of a statute, the purpose of the statute is of critical importance (i.e., what "evils" is the statue directed to). The purpose of § 201(b) of the Communication Act is to protect subscribers from the unrestricted power of a common carrier, by requiring the common carrier's services to be provided to all subscribers on a "just and reasonable" basis.

Therefore, the words "for or in connection with such communication services" in § 201(b) of the Communications Act, should be interpreted to include AT&T's 900 call data, which is necessary for the IP to be able to effectively utilize AT&T's 900 transport services; i.e., to be able to bill its 900 callers.

IV. THE NINTH CIRCUIT'S DECISION SUBSTANTIALLY AFFECTS A RULE OF NATIONAL IMPORTANCE; NAMELY, WHAT SERVICES ARE ". . . FOR OR IN CONNECTION WITH . . . COMMUNICATIONS SERVICES . . ." PURSUANT TO THE FCA, IN WHICH THERE IS AN OVERRIDING NEED FOR NATIONAL UNIFORMITY.

As a result of the foregoing reasons, the Ninth Circuit's decision substantially affects a rule of national importance; namely, what services are ". . . for or in connection with . . . Communications services . . ." pursuant to the FCA, in which there is an overriding need for national Uniformity. See, for example, McDonnell Douglas Corp. v. General Tel. Co. of Cal., 594 F.2d (9th Cir. 1979), cert. denied, 444 U.S. 839 (1979), People of the State of California v. FCC, 905 F.2d 1217 (9th Cir. 1990), and National Ass'n of Regulatory Utility Commissioners v. FCC, 880 F.2d 422 (D.C. Cir. 1989).

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari should be granted.

Dated: March 20, 2000.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

[Filed December 13, 1999]

No. 98-17348
D.C. No. CV-98-00227-PMP

AT&T CORPORATION, *Plaintiff-counter-defendant - Appellee*,	)
v.	)
MRO COMMUNICATIONS, INC., *Defendant-counter-plaintiff- Appellant*.	)

MEMORANDUM[1]

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Court of Appeals Memorandum - 12/13/99

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted November 2, 1999
San Francisco, California

Before: CHOY, SCHROEDER, and ALARCON, Circuit Judges.

MRO Communications, Inc. ("MRO"), appeals from the order granting summary judgment to AT&T Corp. ("AT&T") for $188,870.71 in unpaid charges for transport services provided pursuant to a tariff ("Tariff") filed with the Federal Communications Commission ("FCC") as required by the Federal Communications Act ("FCA"). MRO also appeals from the dismissal of its nine counterclaims.

In its opening brief, MRO sets forth twelve grounds for reversing the district court's orders. We affirm because we conclude that each argument lacks merit. Because the parties are quite familiar with the facts that produced this appeal, we will not summarize them here.

I

MRO contends that the district court erred in ruling that there was no genuine issue of fact in dispute as to the existence and amount of MRO's liability in AT&T's collection action. We review de novo an order granting summary judgment. Burrell v. Star Nursery, Inc., 170 F.3d 951, 954 (9th Cir. 1999). We are persuaded from our independent review of the record that AT&T presented sufficient

admissible evidence to support judgment as a matter of law with respect to both the existence and amount of MRO's liability. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In its opposition to the motion for summary judgment, MRO failed to present specific facts creating a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

A

In support of its motion for summary judgment, AT&T submitted the declaration of Teri Gatto, an AT&T Operations Manager. Gatto alleged that she was responsible for reviewing and verifying the accuracy of AT&T's 900 number transport billing records. Gatto alleged that she had reviewed AT&T's billing records for MRO. She also reviewed the billing statements sent to MRO and found them to reflect accurately that MRO had not paid AT&T $188,870.71 in Tariff transport charges through the February 1998 billing period.

Attached to Gatto's declaration as Exhibit B were copies of billing statements actually presented to MRO from January 1997 through February 1998. Attached as Exhibit C were copies of AT&T's computerized billing records for the time period January 1996 through December 1996. Gatto explained in her declaration that these computerized billing records reflected the "identical information" that had appeared in the billing statements presented to MRO from January 1996 to December 1996. Gatto's declaration also contained a detailed explanation of the method used in calculating MRO's Tariff charges. Attached as Exhibit D was a summary chart breaking down MRO's incurred Tariff charges into three

components, month by month. The chart showed MRO's flat monthly transport service fee, MRO's usage charges for the month, and the billing penalty incurred by MRO for the month. The chart also showed relevant credits to MRO's account.

MRO contends that the Gatto's declaration should not have been admitted because she lacked personal knowledge of the facts and failed to specify which books and records of AT&T she reviewed in preparing her declaration. We review evidentiary rulings in summary judgment proceedings for an abuse of discretion. Maffei v. Northern Ins. Co., 12 F.3d 892, 897 (9th Cir. 1993). Although the facts underlying a declaration introduced in support of a motion for summary judgment must be of a type that would be admissible as evidence, the declaration itself does not have to be in a form that would be admissible at trial. Hughes v. United States, 953 F.2d 531, 543 (9th Cir. 1992). MRO's argument that Gatto's declaration is inadmissible hearsay therefore fails. Id. (rejecting a hearsay objection to a declaration admitted in support of summary judgment). Additionally, we have held that personal knowledge may be inferred from the declarant's position and the nature of his role. Barthelemy v. Air Lines Pilots Ass'n, 897 F.2d 999, 1018 (9th Cir. 1990). Here, Gatto not only expressly alleged that she had personal knowledge of the facts stated in her declaration, she also explained the nature of her position with AT&T and how she came to be familiar with the facts in her declaration.

Finally, Gatto laid an adequate foundation for the authenticity of Exhibits A through E attached her declaration. Gatto had knowledge of the billing practices and records of AT&T both generally and with respect to MRO. She

identified each document contained in Exhibits A through E. Fed. R. Evid. 901 (a)-(b)(1) (testimony of a witness with knowledge that a matter is what it is claimed to be satisfies the authentication requirement); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179, 1182 (9th Cir. 1988). Although Gatto failed to identify Exhibit F, she did not rely on Exhibit F in her calculations. Reliance on Exhibit F is not necessary to support summary judgment in favor of AT&T.

B

The motion for summary judgment related to two issues: the existence of MRO's liability to AT&T for unpaid Tariff charges and the amount of that liability. With respect to the obligation to pay Tariff charges, the legal rights of MRO and AT&T are measured by the terms of the Tariff. Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 126 (1990). Under the "filed rate" doctrine, "'the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext.'" American Tel. & Tel. Co. v. Central Office Tel., Inc., __ U.S.__, 118 S. Ct. 1956, 1962 (1998) (quoting Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97 (1915)); see also 47 U.S.C.§ 203(c). No contract or tort of AT&T or equitable defense of MRO can excuse MRO from paying Tariff charges for transport services used. Maislin Indus., 497 U.S. at 126-27. The filed rate doctrine requires payment by MRO and collection by AT&T of the Tariff charges MRO incurred. Summary judgment therefore was properly granted as to the existence of MRO's liability for unpaid Tariff charges.

In order for AT&T to meet its burden with respect to the amount of MRO's liability, the offered evidence, if

uncontroverted, must have been sufficient to entitle AT&T to $188,870.71 as a matter of law. Celotex Corp., 477 U.S. at 322-23. MRO argues that AT&T failed to meet this burden because AT&T offered no evidence that its billing records accurately reflected MRO's actual usage of transport services.

Had the question of the amount of MRO's liability gone to trial, AT&T's burden would have been to present evidence from which the factfinder could ascertain the amount of damages with "reasonable certainty." Portland 76 Auto/ Truck Plaza, Inc. v. Union Oil Co., 153 F.3d 938, 947 (9th Cir. 1998). The detailed billing records and calculations introduced by AT&T in the Gatto declaration are sufficient to permit a factfinder to conclude with reasonable certainty that MRO actually owed AT&T $188,870.71. We therefore conclude that AT&T met its burden of presenting evidence that, if uncontroverted, would support judgment as a matter of law for AT&T in the amount of $188,870.71.

C

In opposition to summary judgment, MRO alleged that AT&T had a track record of billing errors and accounting discrepancies. The declaration of David Kahn detailed the alleged prior billing errors and also pointed to discrepancies in the Gatto declaration. The alleged prior errors related to billing and collections services, not transport services. Gatto offered in a reply declaration an innocent explanation for the discrepancies MRO had noted in her declaration.

Instead of specific facts creating an issue of fact as to the amount MRO owed AT&T, MRO offered its suspicion of the accuracy of AT&T's billing records. Without more,

merely questioning the credibility of AT&T's evidence was not enough to ward off summary judgment. See National Union Fire Ins. Co. v. Argonaut Ins. Co., 701 F.2d 95, 97 (9th Cir. 1983) ("[N]either a desire to cross-examine an affiant nor an unspecified hope of undermining his or her credibility suffices to avert summary judgment."). The district court did not err in granting summary judgment for AT&T for $188,870.71 in unpaid Tariff charges. MRO also maintains that the district court erred in admitting Todd Touton's declaration. Because Gatto's declaration was sufficient to support the order granting summary judgment, we need not determine whether Touton's declaration was admissible.

On appeal, MRO argues that the district court's refusal to grant MRO's request for further discovery prevented MRO from presenting specific facts to create a genuine issue of material fact. A district court's refusal to permit additional discovery pursuant to Federal Rule of Civil Procedure 56(f) is reviewed for an abuse of discretion. Citicorp Real Estate, Inc. v. Smith, 155 F.3d 1097, 1102 (9th Cir. 1998). The record shows that AT&T and MRO entered into a stipulation staying all discovery in the case until after the district court's decision on AT&T's summary judgment motion. Such stipulations are allowed and even encouraged by Federal Rule of Civil Procedure 29. Stipulations are enforceable "absent circumstances tending to negate a finding of informed and voluntary assent of a party to the agreement." United States v. McGregor, 529 F.2d 928, 931 (9th Cir. 1976); see also United States v. Shapiro, 879 F.2d 468, 470 (9th Cir. 1989). Here, there are no facts suggesting that MRO's assent to the stipulation was uninformed or involuntary. The denial of

MRO's request for discovery was therefore not an abuse of discretion.

D

In granting summary judgment for AT&T, the district court rejected the sixteen affirmative defenses MRO raised in its answer to AT&T's complaint. On appeal, MRO argues that the district court erred in rejecting two of its affirmative defenses. MRO had the burden of establishing the elements of its affirmative defenses. Houghton v. South, 965 F.2d 1532, 1536 (9th Cir. 1992).

1

In its answer to AT&T's complaint, MRO asserted the following as its Third Affirmative Defense:

> AT&T failed to provide MRO within a reasonable time period with readable, billable call records for MRO's AT&T 900 numbers from July, 1997 through approximately October, 1997; which such services were part of AT&T's obligations to MRO under AT&T's Tariff.
>
> Because of such failures by AT&T of its obligations to MRO, and MRO's resulting damages, no monies are due and owing to AT&T from MRO.

MRO's Fourth, Fifth, and Sixth Affirmative Defenses were all variations of the same theory. In its opposition brief, MRO

alleged that 47 U.S.C. § 203(a), Tariff provision 5.4.3, and AT&T's own interpretation of the Tariff obligated AT&T to provide timely, legible call records to MRO. MRO also submitted to this court a copy of Tariff provision 5.4.4.

Under the filed rate doctrine, "'[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.'" Maislin Indus., 497 U.S. at 126 (quoting Keogh v. Chicago & Northwestern Ry. Co., 260 U.S. 156, 163 (1922)). No equitable defense can excuse MRO from paying Tariff charges it incurred. Id. at 127. Even if MRO's course of dealing with AT&T led MRO reasonably to expect AT&T to provide timely, legible call data, it does not follow that AT&T had a duty under the Tariff to furnish that data. MRO's extrapolation of some duty on AT&T's part to provide call records is not supported by the language of the Tariff provisions or the statute to which MRO pointed. Moreover, the theory that there is any condition precedent to MRO's obligation to pay Tariff charges is at odds with the filed rate doctrine. Id.; see also 47 U.S.C. § 203(c). The district court therefore did not err in rejecting this affirmative defense.

2

MRO asserted the FCA statute of limitations as its Second Affirmative Defense. The FCA statute of limitations provides, in pertinent part, that "[a]ll actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun, within two years from the time the cause of action accrues, and not after." 47 U.S.C. § 415(a). The award of $188,870.71 in unpaid Tariff charges reflected MRO's outstanding balance on Tariff charges billed from January 1996 through February 1998. MRO contends that the

district court erred in awarding damages for the January 1996 bill because AT&T's complaint was not filed until February 6, 1998.

MRO made some payments to AT&T during the time period in issue. According to Gatto's declaration, MRO was billed for a total of $294,189.90 in Tariff charges and made a total of $105,319.19 in payments from January 1996 through February 1998. The award of $188,870.71 was the difference in these two amounts. It would be logical for MRO's payments to AT&T during the time period in issue to extinguish MRO's outstanding charges in the order the charges were incurred, with the January 1996 Tariff charges of $15,368.03 being among the first to be extinguished. Because the award of damages did not necessarily encompass charges billed in January 1996, MRO's argument fails.

On appeal, MRO also argues that the district court erred in allowing AT&T to recover Tariff charges for January and February 1998 because AT&T sought in its complaint to recover only charges incurred from October 1995 through December 1997. This argument also fails. See Fed. R. Civ. P. 54(c) (stating that, except in cases of default judgment, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings").

II

In its answer, MRO raised nine counterclaims. On a motion by AT&T pursuant to Federal Rule of Civil Procedure 12(b)(6), the district court dismissed the first five for failure to state a claim upon which relief can be granted. The district

court dismissed the remaining four on the basis of claim preclusion. On appeal, MRO contends that the district court erred in its dismissal of each of the nine counterclaims.

A

MRO's first five counterclaims advanced five different theories of recovery for the same alleged conduct by AT&T, namely that "AT&T failed to provide MRO within a reasonable time period with readable, billable call records for MRO's AT&T 900 numbers from July, 1997 through approximately October, 1997, which services were part of AT&T's obligations to MRO." The district court's dismissal of these five counterclaims is reviewed de novo. Arnett v. California Pub. Employees Retirement Svs., 179 F.3d 690, 694 (9th Cir. 1999). The district court properly considered the relevant documents under the doctrine of incorporation by reference. Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994). We affirm the dismissal of these five counterclaims because it appears beyond doubt that MRO could prove no set of facts that would entitle it to relief. Morley v. Walker, 175 F.3d 756, 759 (9th Cir. 1999).

1

In its First Counterclaim, MRO alleged that AT&T's failure to provide timely, legible call records breached AT&T's obligations to MRO under the Tariff. This counterclaim fails for the same reason MRO's affirmative defense based on the same theory fails.

In its Second Counterclaim, MRO alleged that AT&T's failure to provide timely, legible call records breached a contract formed by AT&T and MRO in October 1995. For this claim to withstand AT&T's motion to dismiss, MRO had to "allege[] facts necessary to establish contract formation." Snyder v. Viani, 885 P.2d 610, 613 (Nev. 1994); see also Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1319-20 (9th Cir. 1996) (affirming dismissal of breach of contract claim pursuant to Rule 12(b)(6) because plaintiff had "not demonstrated that the parties intended to create direct legal obligations between themselves"). Under Nevada law, "[e]ssential to the creation of a contract, whether express or implied, is a manifestation, by the parties, of an intent to contract." Warrington v. Empey, 590 P.2d 1162, 1163 (Nev. 1979); see also Weichert Co. Realtors v. Ryan, 608 A.2d 280, 284 (N.J. 1992) (same).

To demonstrate the existence of a contract obligating AT&T to provide timely, legible call data to MRO, MRO offered six pieces of correspondence. Four of the six letters were generated by MRO, not AT&T. The two letters generated by AT&T sought only to clarify MRO's intentions and revealed nothing about AT&T's intentions. Nothing in the six letters demonstrated a manifestation of intent on the part of AT&T to contract to provide timely, legible call records, or any call records at all, to MRO. Because MRO failed to "allege[] facts necessary to establish contract formation," the Second Counterclaim was properly dismissed for failure to state a claim. Snyder, 885 P.2d at 613.

In its Third Counterclaim, MRO sought to have AT&T held in civil contempt for violating an order of the court. The district court's rejection of MRO's claim for contempt is reviewed for an abuse of discretion. Balla v. Idaho State Bd. of Corrections, 869 F.2d 461, 464 (9th Cir. 1989).

In dismissing MRO's Third Counterclaim, the district court explained its reason for granting the court order in issue and stated that "MRO would have this Court reinterpret its own Order so as to impose an affirmative duty upon AT&T to provide call records directly to MRO. This was not the intent of this Court." We affirm the dismissal of MRO's Third Counterclaim because the district court had "wide latitude in making a determination of whether there has been a contemptuous defiance of its own orders." Neebars, Inc. v. Long Bar Grinding, Inc., 438 F.2d 47, 48 (9th Cir. 1971).

4

In its Fourth Counterclaim, MRO alleged that AT&T's failure to provide timely, legible call records was a breach of AT&T's duty of care to MRO. To prevail on its claim of negligence, MRO would first have to establish that AT&T owed a contractual duty to MRO. Scialabba v. Brandise Constr. Co., 921 P.2d 928, 930 (Nev. 1996). MRO offered four possible sources of a contractual duty on the part of AT&T to provide timely, legible call records MRO: the Tariff, the alleged October 1995 contract between AT&T and MRO, the September 5, 1995, court order, and AT&T's contract with International Telemedia Associates, Inc. ("AT&T-ITA contract"). As discussed above, MRO failed to

establish that AT&T had a legal duty to provide call records to MRO under the Tariff, the alleged October 1995 contract, or the court order.

MRO was not a party to the AT&T-ITA contract. To prevail on its Fourth Counterclaim, MRO would have to establish that it was an intended third party beneficiary. Klamath Water Users Protective Ass'n v. Patterson, 191 F.3d 1115, 1119 (9th Cir. 1999).

The AT&T-ITA contract contains a New Jersey choice of law provision. Under New Jersey law, the "real test" of intended third party beneficiary status is "whether the contracting parties intended that a third party should receive a benefit which might be enforced in the courts." Broadway Maintenance Corp. v. Rutgers State Univ., 447 A.2d 906, 909 (N.J. 1982). Here, the AT&T-ITA contract provided that "[t]his Agreement shall not create for, nor give to, any third party any claim or right of action against AT&T that would not arise without this Agreement." MRO therefore has no rights under the AT&T-ITA contract. Id. ("The parties of course may expressly negate any legally enforceable right in a third party."). Because MRO failed to establish a contractual duty on the part of AT&T to provide call records to MRO, we affirm the dismissal of MRO's Fourth Counterclaim.

MRO's related argument that the district court should have permitted MRO to bring ITA into the lawsuit as an "involuntary plaintiff" pursuant to Federal Rule of Civil Procedure 19(a) is unpersuasive. This court has "sharply restricted" the application of the involuntary plaintiff doctrine to cases in which the unwilling party owes the plaintiff a duty

to allow its name to be used in the action. Kidwell ex rel. Penfold v. Meikle, 597 F.2d 1273, 1287-88 n.5 (9th Cir. 1979). In invoking the involuntary plaintiff doctrine, MRO sought to make an end run around the settled rule that an unintended beneficiary of a contract cannot sue for breach of the contract. We find no precedent to support allowing this.

5

As discussed above, the express terms of the AT&T-ITA contract foreclosed the possibility of MRO being an intended third party beneficiary. The district court properly dismissed the Fifth Counterclaim.

B

MRO contends that the district court erred in dismissing its last four counterclaims on the basis of claim preclusion because the counterclaims cover a different time period than the claims raised in MRO Communications, Inc. v. American Telephone & Telegraph Co., No. CV-S-95-503-PMP (D. Nev.). MRO also argues that the claims in the earlier action were not adjudicated on the merits. A district court's dismissal on the basis of claim preclusion is reviewed de novo. Cabrera v. City of Huntington Park, 159 F.3d 374, 381 (9th Cir. 1998). The four counterclaims were properly dismissed because all four arose out of the same nucleus of facts as claims made in MRO Communications, Inc. v. American Telephone & Telegraph Co., which ended in a final judgment on the merits for AT&T.

The doctrine of claim preclusion prohibits the litigation in the present action of any claims that MRO raised or could

have raised in the prior action. Cabrera, 159 F.3d at 381. For MRO's counterclaims to be subject to claim preclusion, there must be (1) an identity of claims (2) a final judgment on the merits; and (3) identity or privity between parties. Id. The third element is obviously satisfied as to all four of these counterclaims. We have established four criteria to be used in determining whether there is an identity of claims: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. In re Imperial Corp. of America, 92 F.3d 1503, 1506 (9th Cir. 1996). The last criterion is the most important. Id.

1

In its Sixth Counterclaim, MRO alleged that "AT&T breached its agreement(s) with MRO (including, but not limited to Sections 3.A. and 3.B. of the MRO BSA) when AT&T unilaterally and retroactively shifted to MRO the risks that (i) uncollectibles already paid to MRO, and (ii) more-than-ninety-day-old chargebacks." MRO made the same claim, verbatim, in MRO Communications, Inc. v. American Telephone & Telegraph, Co., No. CV-S-95-503-PMP (D. Nev.). That claim went to trial on May 4, 1998. On May 18, 1998, the district court disposed of that claim when it granted AT&T's motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a). On a motion by AT&T, the district court modified the May 18, 1998, judgment to provide that: "pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, final Judgment is hereby

entered in favor of AT&T and against Plaintiff MRO with respect to all [MRO's] claims." The preclusive effect of that final judgment is not disrupted by the pendency of an appeal in that case before this court as MRO Communications, Inc. v. American Telephone & Telegraph Co., No. 98-16716. See Clements v. Airport Authority, 69 F.3d 321, 329 n.7 (9th Cir. 1995).

2

The only thing that distinguishes the Seventh Counterclaim from a claim in the earlier action is the fact that MRO used the term "erroneous" in one and "bogus" in the other in describing the chargebacks that AT&T allegedly deducted from MRO's revenues. The distinction is neither legally nor factually significant. The district court disposed of the claim in the earlier action when it entered final judgment for AT&T.

3

In its Eighth Counterclaim, MRO alleged that AT&T "refused to consent to the assignment of AT&T's billing services and tariffed transport services for MRO's 900 AT&T numbers, or the MRO BSA (to MicroVoice Applications, Inc. or any other company) from at least 1994 until approximately October 1997" and that this was a breach of contract. In the prior action, MRO alleged that "AT&T's "refusal to assign billing services (or a BSA), was a breach of contract. . . ." The breach of contract claim went to trial in the district court on May 4, 1998. The district court disposed of that claim when it entered final judgment for AT&T.

In its Ninth Counterclaim for violation of the FCA, MRO alleged that AT&T had "refused to change the termination point of MRO's 900 telephone numbers . . . from Las Vegas to Reno" in violation of FCA, 47 U.S.C. §§ 201 and 202. In prior action, MRO claimed AT&T "refused to change the termination point of MRO's tariffed transport services on MRO's existing 900 numbers from Las Vegas to Reno" in violation of 47 U.S.C. §§ 201 and 202. That portion of the FCA claim went to trial. The district court disposed of that claim when it entered final judgment for AT&T.

In the Ninth Counterclaim MRO also alleged that AT&T's "refus[al] to consent to the assignment of AT&T's billing services and tariffed transport services for MRO's 900 AT&T numbers, or the MRO BSA (to MicroVoice Applications Inc. or any other company)" violated the FCA. MRO challenged this same conduct in the earlier action but failed to claim there that it was a violation of the FCA. MRO's failure cannot avert claim preclusion in the present action. See Lea v. Republic Airlines, Inc., 903 F.2d 624, 634 (9th Cir. 1990) (concluding that claim preclusion applied to claim of plaintiff who"' did not happen to think of the theory he now advances'" during earlier action).

MRO's argument that these four counterclaims are not precluded because they cover the time period after the filing of MRO's complaint in the earlier action fails. MRO alleged no conduct of AT&T in these four counterclaims that was not alleged in the earlier action. Because MRO "did not claim that [AT&T was] doing anything different from what they had

done before," all four of these counterclaims were properly subject to claim preclusion. In re Dual-Deck Video Cassette Recorder Antitrust Litig., 11 F.3d 1460, 1463-64 (9th Cir. 1993).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed November 3, 1998]

CV-S-98-227-PMP (RLH)

AT&T CORPORATION,
Plaintiff,

v.

MRO COMMUNICATIONS, INC.,
Defendant.

ORDER

Presently before the Court is Plaintiff AT&T Corp.'s ("AT&T") Motion for Summary Judgment and to Dismiss Defendant MRO Communications, Inc.'s ("MRO") Counterclaims (#7A) filed March 30, 1998. MRO filed an Opposition to Plaintiff's Motion for Summary Judgment and to Dismiss MRO's Counterclaims (#36) on July 10, 1998. On August 3, 1998, Plaintiff filed a Reply Memorandum in Support of its Motion for Summary Judgment and to Dismiss MRO's Counterclaims (#40).

I. INTRODUCTION

AT&T brings this motion for an order granting summary judgment, pursuant to Federal Rule of Civil Procedure 56, on its first claim for relief based on MRO's failure to make payments to AT&T for 900 number "call transport services" provided to MRO. These transport services were provided pursuant to a tariff filed with the Federal Communications Commission ("FCC"). In addition, AT&T moves for dismissal of all nine counterclaims filed by MRO.

To resolve the summary judgment portion of AT&T's motion, the Court must determine: (1) the effect of the so-called "filed tariff doctrine" on AT&T's claim for $188,870.71 in unpaid call transport charges and (2) whether MRO's evidentiary objections to AT&T's supporting declarations, MRO's denials as to the existence and amount of any unpaid transport charges, and the proffered affirmative defense of AT&T's alleged failure to provide "timely, legible call records" create any material issues for trial.

In contrast, to adjudicate AT&T's Motion to Dismiss MRO's counterclaims under Federal Rule of Civil Procedure 12 (b)(6), this Court must determine the legal effect, if any, of AT&T's alleged failure to provide "timely, legible call records" and the applicability of the doctrine of res judicata:

II. FACTUAL BACKGROUND

This is not the first time the Court has visited the on going dispute between AT&T and MRO. In a prior action between these two parties, MRO Communications, Inc. v.

AT&T Corp., CV-S-95-503 PMP (RLH) ("Prior Action"), this Court dismissed MRO's claims pursuant to AT&T's motion for judgment as a matter of law, under Federal Rule of Civil Procedure 50(a) during trial. (Mins. of the Ct., Doc. #378). The current matter before the Court involves issues that were not addressed in the Prior Action: AT&T's claim for unpaid network "transport charges" and MRO's counterclaims alleging new breaches of contract and injuries in tort.

The extant claims arise from a dispute between AT&T and MRO over the provision of "900" telephone numbers. In conjunction with its 900 numbers, AT&T provides two types of services: (1) "transport services," which supply the telephone lines over which information and voice can be conveyed and (2) "billing services," by which AT&T bills and collects fees from end users of 900 telephone numbers. Entities like MRO, who purchase these 900 numbers, are not themselves the end users; rather, they are "information providers" who establish pay-per-call information services for fields such as business, weather, entertainment, travel, and merchandising. It is the patrons of these services that, in turn, comprise the billed end users.

The same company is not required to supply both services. An information provider, while purchasing transport services from AT&T, may choose to conduct its own billing or arrange for billing services from a company other than AT&T. Conversely, AT&T may decide to provide transport services, while declining to supply billing services for those 900 numbers.

The two services are also treated differently by the law. Transport services are governed by federal statutes and a "tariff," a document describing costs and services, which is submitted by AT&T and subject to the approval of the FCC. The relevant tariff in this proceeding is AT&T's FCC Tariff No. 1. (Touton Decl. Ex. B.) The billing services, on the other hand, are governed by contract law.

Since 1989, MRO has purchased transport services for its 900 numbers from AT&T. Between May 2, 1989, and October 10, 1995, AT&T also provided the billing services for MRO's 900 numbers, pursuant to a billing services agreement (the "BSA"). However, after AT&T's termination of the BSA, MRO sought the aid of International Telemedia Associates, Inc. ("ITA"). On September 20, 1995, MRO and ITA executed a billing services contract (the "MRO-ITA Contract") for the same 900 numbers for which AT&T was providing tariffed call transport services. (See MRO-ITA Contract, attached as Ex. E, Touton Decl.) Apparently, the collection of 900 number data necessary for the calculation and collection of bills was controlled by a Network Information and Management Reports Agreement between AT&T and ITA (the "AT&T-ITA Contract"). (See AT&T-ITA Contract, attached as Ex. D, Touton Decl.)

AT&T moves for summary judgment of its claim for unpaid monthly transport charges assessed on MRO between January 1996 and February 1998. AT&T argues that, under its filed tariff, it is entitled to summary judgment since: (i) MRO utilized AT&T's tariffed call transport services; (ii) MRO was billed by AT&T for such services; and (iii) MRO failed to fully pay for such services.

In its Answer to AT&T's Complaint (#3), MRO also asserts nine counterclaims. The first through fifth counterclaims are based on the theory that AT&T's provision of call transport services was improper, in contract and tort, because of AT&T's alleged failure to furnish adequate billing information to ITA between July and October 1997. MRO's sixth through ninth counterclaims allege breaches of contract by AT&T and the violation of federal statutes. AT&T requests that these counterclaims be dismissed, pursuant to Federal Rule of Civil Procedure 12(b) (6), for failure to state a claim upon which relief can be granted.

III. DISCUSSION

A. Summary Judgment Standard of Review

Pursuant to Federal Rule of Civil Procedure 56, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. All facts and inferences drawn must be viewed in the light most favorable to the responding party when determining whether a genuine issue of material fact exists for summary judgment purposes. Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1050 (9th Cir. 1995). After drawing inferences in the light most favorable to the respondent, summary judgment will be granted only if all reasonable inferences defeat the respondent's claims as a matter of law. S.E.C. v. Seaboard Corp., 677 F.2d 1297, 1298 (9th Cir. 1982).

A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. See S.E.C.v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982). The substantive law defines which facts are material. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). A genuine issue of material fact is more than some "metaphysical doubt" as to the material facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Only disputes over outcome determinative facts under the applicable substantive law will preclude the entry of summary judgment. Id. If the factual context makes the respondent's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. Metro Indus., Inc. v. Sammi Corp., 82 F.3d 839, 847 (9th Cir.), cert. denied, _U.S._; 117 S. Ct. 181 (1996). Once the movant's burden is met by presenting evidence which, if uncontroverted, would entitle the movant to a directed verdict at trial, the burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. Liberty Lobby, 477 U.S. at 250. In meeting this burden, parties seeking to defeat summary judgment cannot stand on their pleadings once the movant has submitted affidavits or other similar materials. Affidavits that do not affirmatively demonstrate personal knowledge are insufficient. Keenan v. Allan, 91 F.3d 1275, 1278 (9th Cir. 1996).

The Supreme Court cases cited above establish that "[s]ummary judgment procedure is properly regarded not as

a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp., 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

B. Summary Adjudication of AT&T's Claim for Unpaid Transport Services

The Court finds that MRO has failed to raise any triable issues of fact or to demonstrate that AT&T is not entitled to summary adjudication as a matter of law in regards to AT&T's claim for unpaid transport charges.

The law is clear that under the "filed tariff" doctrine, AT&T is entitled to payment for all call transport services it provided to MRO pursuant to FCC Tariff No. 1.

As an interstate common carrier of telephone services, AT&T is governed by the Federal Communications Act of 1934 ("FCA"), 47 U.S.C. §§ 151-229. Section 203(a) of Title 47 provides that every common carrier must file with the FCC "schedules" (also known as "tariffs") indicating "all charges for itself and its connecting carriers" and "the classifications, practices, and regulations affecting such charges." Section 203(c) states, in pertinent part, that no carrier can "charge, demand, collect, or receive" any sum different than that specified in the filed tariff. These sections are modeled after similar provisions in the Interstate Commerce Act ("ICA") and the filed rate doctrine (also known as the "filed tariff doctrine") associated with that act. AT&T v. Central Office Tel., Inc., 118 S.Ct. 1956, 1962 (1998) (citing MCI Telecomm. Corp. v. AT&T, 512 U.S.

218, 229-30 (1994)). Hence, courts hearing suits under the FCA will be guided by analogous decisions construing the ICA. Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 (1981); Cincinnati Bell Tel. v. Allnet Communication Servs., 17 F.3d 921, 923 n.1 (6th Cir. 1994).

The basic goals of the filed rate doctrine are the suppression of unreasonable, discriminatory charges and the prevention of secret or special agreements. MCI Telecomm. Corp., 512 U.S. at 229-30; Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97 (1915); Re AT&T, 42 F.C.C.2d 654 (1973). To achieve these ends, the filed rate doctrine has developed an admittedly strict set of rules. "Ignorance or misrepresentation of rates is not an excuse for paying or charging either less or more than the rate filed." Louisville & Nashville R. Co., 237 U.S. at 97. Equitable considerations can neither prevent a carrier's recovery of the filed tariff charge, Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Fink, 250 U.S. 577, 582-83 (1919), nor justify a carrier's failure to collect such charge. Baldwin v. Scott County Milling Co., 307 U.S. 478, 485 (1939); Illinois Cent. Gulf R.R. Co. v. Golden Triangle Wholesale Gas Co., 586 F.2d 588, 592 (5th Cir. 1978). The rights as defined by the tariff cannot be enlarged or varied by contract or the tort of the carrier. Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 416-17 (1986); Keogh v. Chicago & Northwestern R.R. Co., 260 U.S. 156, 163 (1922); Milne Truck Lines, Inc. v. Makita U.S.A., Inc., 970 F.2d 564, 572 (9th Cir. 1992); see Consolidated Freightways Corp. v. Terry Tuck, Inc., 612 F.2d 465, 466 (9th Cir. 1980) ("[N]o claim for relief can be predicated on a carrier's alleged fraudulent misquotation of tariffs."). These filed tariffs have the force of law. Farley Transp. Co. v. Santa Fe Trail Transp. Co., 778 F.2d 1365,

1372 (9th Cir. 1985); Carter v. AT&T, 365 F.2d 486 (5th Cir. 1966).

In the process of effecting its non-discriminatory goals, "the filed rate doctrine is not limited to 'rates' per se." Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986). That is, the filed tariff also governs all procedures and acts by the carrier that affect the price of the service rendered. Id. at 967; Boston & Maine R.R. v. Hooker, 233 U.S. 97, 119 (1914).

AT&T presents evidence demonstrating that it is entitled to payment for its provision of call transport services. Both parties agree that AT&T provided tariffed call transport services to MRO for calls to MRO's 900 telephone number programs. (Def.'s Answer ¶4.) The parties also agree that MRO received bills, during the period between January 1996 and February 1998, reflecting charges incurred by MRO for both call transport services and other services. (Def.'s Answer ¶¶7-8.) AT&T cites the relevant section of FCC Tariff No. 1, which states that "[p]ayment for LDMTS [call transport services] is due upon presentation of the bill." (Tariff §2.5.3, attached as Ex. B, Touton Decl.) AT&T also presents considerable evidence demonstrating that, after deducting payments made by MRO during that period and costs for non-transport services, MRO nevertheless had an unpaid balance of $188,870.71 for call transport charges. This evidence includes: the declaration of a billing operations manager (Touton Decl. ¶¶3-4, 7-35); monthly billing statements (Touton Decl. Ex. B); AT&T computerized billing records (Touton Decl. Ex. C); and a summary chart of tariffed transport charges (Touton Decl. Ex. D). Thus, under the summary judgment standards and the filed tariff doctrine,

which defines the parameters of MRO's payment obligations for call transport services, AT&T has satisfied its burden of establishing its entitlement to relief unless MRO is able to raise genuine triable issues.

1. MRO's Arguments in Opposition to Summary Judgment

After examining MRO's arguments in opposition to AT&T's motion for summary judgment, the Court concludes that MRO fails to raise any triable material issues and that AT&T is entitled to summary judgment of its claim for $188,870.71 in unpaid call transport charges. In reaching this conclusion, the Court rejects each of the opposing arguments advanced by MRO.

a. Admissibility of Declarations Submitted by AT&T

MRO contends that portions of the declarations of Todd Touton and Terri Gatto, which provide the bulk of the evidentiary support for AT&T's motion, should be stricken from the record, on the grounds that the declarants lack personal knowledge and an adequate evidentiary foundation for the conclusions they set forth, as required by Federal Rule of Civil Procedure 56(e).[1] In particular, MRO argues that

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[1] Federal Rule of Civil Procedure 56(e), which governs summary judgment motions, states in pertinent part that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

each declarant's alleged non-expert status requires the submission of the entire text of FCC Tariff No. 1, as opposed to the relevant sections excerpted in each declaration. After reviewing the applicable authorities, the Court rejects these contentions and finds the declarations to be admissible.

First, the Court finds the declaration of Todd Touton, local counsel for AT&T, to be in conformance with Rule 56(e). Attorney declarations that merely identify attached documents as "true and correct copies" are admissible, especially when many of the documents are matters of public record, see, e.g. Lowell v. Wantz, 85 F.R.D. 290 (E.D.Pa. 1980), as is the case here. Moreover, it is immaterial that only selected portions of AT&T's tariff were submitted. Tariffs, which are available to the public, 47 U.S.C. §203(a); Farley Transp. Co. v. Santa Fe Trail Transp. Co., 778 F.2d 1365, 1372 (9th Cir. 1985), do not require the interpretive aid of experts when there are no colorable ambiguities or technical connotations of language. U.S. v. Atchison, Topeka, and Santa Fe Ry. Co., 725 F.2d 469, 470 (9th Cir. 1980); Penn Cent. Co. v. General Mills, 439 F.2d 1338, 1340-41 (8th Cir. 1971). Thus, it is appropriate for even alleged non-expert declarants, such as Touton, to excerpt relevant sections of a duly-filed tariff.

Though at first glance the text seems limited to affidavits, declarations submitted in conjunction with summary judgment motions are also subject to Rule 56(e). See William W. Schwarzer, A. Wallace Tashima, James W. Wagstaffe, Federal Civil Procedure Before Trial ¶¶14:161-65 (1998). Thus, courts will also construe declarations made under penalty of perjury to have the same effect as affidavits. 28 U.S.C. §1746; Jack v. Trans World Airlines, 854 F. Supp. 654, 658 (N.D.Calif. 1994).

Similarly, the Court finds the declaration of Terri Gatto, a billing manager for AT&T, to also be devoid of ambiguity or incompetency. For the same reasons stated, *supra,* Gatto's citation of only relevant portions of the filed tariff is acceptable. Moreover, contrary to MRO's arguments, the Gatto Declaration contains specific facts and indicates the source of personal knowledge -- a personally supervised accounting review -- in a manner adequate for the purposes of Rule 56(e). Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Any remaining doubt is erased by the holding of Barthelemy v. Air Line Pilots Ass'n, 897 F.2d 999 (9th Cir. 1990), where the court held that personal knowledge could also be inferred from the declarant's position and nature of participation.

For the foregoing reasons, the Court denies MRO's request to strike portions of the said declarations. The Court also denies MRO's related request for further discovery of AT&T's billing records.

b. MRO's Challenges to the Existence and Amount of Liability

MRO also argues that triable issues exist as to the amount of MRO's liability, due to: (i) alleged inaccuracies in AT&T's monthly invoices; (ii) discrepancies between the alleged amount of unpaid transport charges stated in AT&T's complaint and the amount claimed in the summary judgment motion; and (iii) the impermissible addition of billing service charges to AT&T's claim for unpaid transport services. The Court finds that the first argument is barred as a matter of law

by the filed rate doctrine, while the latter two arguments fail to raise any genuine issues for trial.

First, MRO's claims of alleged inaccuracies in AT&T bills are barred by the filed rate doctrine. Section 2.5.3.D of FCC Tariff No. 1 provides that "[i]f a Customer does not provide the Company [AT&T] with written notice of a dispute with respect to LDMTS [long-distance] charges within six months from the date the bill was first presented to the Customer for payment, such charges shall be deemed to be correct and binding on the Customer." This provision took effect on June 15, 1996. It is unchallenged that MRO failed to provide any written notice of a dispute regarding the relevant transport charges within this six-month window. Under the filed rate doctrine, this provision has the force of law and bars MRO's defense that AT&T incorrectly calculated the price of its tariffed services. Farley Transp. Co. v. Santa Fe Trail Transp. Co., 778 F.2d at 1372. Even if correct, AT&T's alleged wrongdoing cannot vary the duties and remedies of Section 2.5.3.D. This admittedly harsh result is the product of the filed rate doctrine's insistence that the tariff and any penalty provisions attached thereto control the relationship between the customer and the service provider. Id. Therefore, even a miscalculated figure would constitute the duly authorized charges of the tariff at this late date.

Second, the Court rejects MRO's contention that discrepancies between the amounts claimed in AT&T's complaint and the amounts claimed in the motion for summary judgment raise *per se* triable issues of fact. Discrepancies between monetary amounts requested in different pleadings may prevent summary adjudication when they are both material to the case and unexplained by the moving party.

See,e.g. St. Paul Fire and Marine Ins. Co. v. Farner, 648 F.2d 489, 491 (8th Cir. 1981). AT&T clearly stated in its motion for summary judgment that a lesser amount than that claimed in the complaint would be sought, on the grounds that it was deducting unpaid transport charges for thirteen numbers that MRO allegedly wanted to disconnect.[2] (AT&T's Mot. for Sum. J. at 12-13, n. 1; Gatto Decl. ¶¶25-31.) AT&T also presents detailed evidence (billing statements, computerized billing records, chart summaries) detailing the amount of monies owed under the remaining numbers for transport services. (Gatto Decl. Exs. B-D.) In opposition, MRO presents no specific facts contradicting AT&T's contention that the reduced amount sought in the motion stemmed from anything other than the elimination of claims as to thirteen of the telephone numbers. As a result, the Court finds that the discrepancy in the pleadings does not raise any triable issues of fact.

Third, MRO's contention that AT&T's motion seeks compensation for billing services and chargebacks, in addition to amounts legitimately owed for transport services, is similarly misplaced. AT&T clearly stated in its motion that it sought relief in the present proceeding solely for transport services governed by the tariff. (AT&T's Mot. at 3-4.) To that end, AT&T utilized a methodology which, though drawing upon bills that itemized both transport and billing service charges, actually calculated *only* the charges owed for the former. (Gatto Decl. ¶¶7,11-24; Gatto Reply Decl. ¶¶3-

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[2] The Court will construe this deduction as the extinguishment of AT&T's claim of relief for alleged unpaid charges as to these thirteen telephone lines.

4.) The restriction of AT&T's methodology to the calculation of transport charges is clearly documented (Gatto Decl. ¶¶11-24) and explained step-by-step to this Court. (Id.) In opposition, MRO attempts to fabricate a triable issue by pointing out that the invoices submitted by AT&T itemize both transport and billing services. (Kahn Decl. ¶2; Def.'s Opp. Ex. A.) This critique, however, fails to controvert or even address AT&T's transport charge-exclusive methodology and the well-documented data upon which it is based. The methodology presented in the Gatto Declaration clearly uses only the figures relating to transport charges. Accordingly, this Court rejects MRO's argument and holds that it is insufficient to raise any triable issues.

c. Call Records to MRO

Lastly, the Court rejects MRO's affirmative defense that AT&T's alleged failure to provide "readable, billable call records"[3] in a timely fashion prevents AT&T from recovering unpaid transport charges as a matter of law. A defendant raising an affirmative defense bears the burden of establishing all elements as to that defense when opposing summary judgment. See, e.g. Houghton v. South, 956 F.2d 1532, 1536 (9th Cir. 1992); CHG Int'l, Inc. v. Barclays Bank, 897 F.2d 1479, 1480 (9th Cir. 1990). MRO mistakenly argues that AT&T's alleged failure to provide readable, timely records creates an affirmative defense because: (i) the tariff required

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[3] Call records include such things as the calling telephone number and the date and duration of the 900 call. This information is used in the collection of bill payments.

the provision of call detail records and (ii) AT&T had "always interpreted" the 900 services tariff to include the provision of call records and accordingly was bound to provide such records before the collection of any fees. The Court rejects each of these arguments.

First, MRO fails to demonstrate that the tariff required the issuance of any call records whatsoever. The interpretation of a tariff is a matter law for the court, Atchison, Topeka, and Santa Fe Ry. Co., 725 F.2d at 470, when there are no colorable ambiguities or technical connotations. Penn Cent. Co., 439 F.2d at 1340-41; North Penn Transfer, Inc. v. Victaulic Co. of America, 859 F.Supp. 154, 163 (E.D.Pa. 1994). MRO claims that Section 5.4.3.A of FCC Tariff No. 1, which delineates the rate of AT&T transport service charges, mandates the provision of call records. It states, in relevant part, that:

> "The monthly charges for AT&T MultiQuest Service apply per [the] Service Arrangement. The Service Arrangement is a combination of network hardware and software programming which provides the capability for calls to a Customer's 900 number to be routed to a Customer-designated AT&T Central Office."

(Tariff §5.4.3.A.) A plain reading of this section indicates that it refers to the hardware and software for the conveyance of calls from one point to another. This Court finds no indication of any duty to provide detailed information about telephone numbers; call duration, or the date of charged 900 calls in the proffered text. MRO fails to present any additional evidence or textual support for its contrary

interpretation. Accordingly, as a matter of law, MRO has failed to establish the existence of any duty to provide call records.

Second, it is irrelevant whether AT&T had "always interpreted" the filed tariff as including the provision of call records. MRO contends that AT&T had previously agreed to provide call records or represented that such records would be part of AT&T's transport services. As stated before, the rights as defined by the tariff cannot be enlarged or varied by contract or the tort of the carrier under the filed rate doctrine. Square D Co., 476 U.S. at 416-17 (1986). Pursuant to Section 2.5.3 of the filed tariff, all "payment for LDMTS [long distance services] is due upon presentation of the [monthly] bill." (Tariff §2.5.3.) The existence of any alleged extra-tariff agreements or tortious misrepresentations cannot vary the respective rights of AT&T and MRO.

Thus, AT&T is entitled to summary judgment of its claim for $188,870.71, MRO's unpaid balance of transport service charges. MRO has failed to present "significantly probative" evidence sufficient to permit a trier of fact to find in its favor, Anderson, 477 U.S. at 249-50, or to at least create triable issues of material fact.

C. AT&T's Motion to Dismiss MRO's Counterclaims

The Court also finds that AT&T's motion to dismiss MRO's counterclaims, pursuant to Federal Rule of Civil Procedure 12(b) (6), should be granted in its entirety. In reaching this conclusion, the Court also considers the

counterclaims as amended by MRO's requests[4] in its Opposition to AT&T's motion. All of MRO's counterclaims, in one way or another, have the Court consider the legal effect, if any, of AT&T's alleged failure to provide call records to MRO.

The Court must presume all of MRO's factual allegations to be true, Neitzke v. William, 490 U.S. 319, 326-37 (1989); Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996), and draw all reasonable inferences in favor of the counterclaimant. Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). The issue is not whether MRO will ultimately prevail, but whether it is entitled to offer evidence in support of its claims. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996).

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[4] Federal Rule of Civil Procedure 15(a) states that leave to amend "shall be freely given when justice so requires." See Foman v. Davis, 371 U.S. 178, 182 (1962). Here, MRO did not file the required separate motion to amend pleadings, Dist, Nev. Rule 15-1(a), nor did it tender the proposed new pleadings as a separate attachment. Id. Instead, MRO proposed several amendments, in a somewhat vague manner, within the text of its Opposition. However, courts have the discretion to grant such requests even when they are "not contained in a properly captioned motion paper," Scott v. Eversole Mortuary, 522 F.2d 1110, 1116, n. 8 (9th Cir. 1975); Edwards v. Occidental Chemical Corp., 892 F.2d 1442, 1445-46, n. 2 (9th Cir. 1990), as in the case here. Thus, in the interests of justice, this Court will also consider MRO's counterclaims in their amended form to the extent it is possible to decipher MRO's ambiguous requests.

Thus, the Court will grant a Rule 12(b) (6) motion only if there is either a "lack of a cognizable theory," Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990), or an absence of sufficient facts alleged under a cognizable theory. Id.; Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The Court will not, however, necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in the counterclaim. Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981), cert. denied, 454 U.S. 1031 (1981). Nor will the Court accept unreasonable inferences or unwarranted deductions of fact. Aulson v. Blanchard, 83 F.3d 1,3 (lst Cir. 1996); S.E.C. v. Seaboard Corp., 677 F.2d 1315, 1316 (9th Cir. I982).

1. First Counterclaim- Violation of Tariff

As originally filed, MRO's first counterclaim is dismissed pursuant to Rule 12(b) (6). MRO alleged that, under the tariff, AT&T had a duty to provide timely, legible call records and that AT&T had breach this duty by tardily providing these records. While MRO did not attach a copy of the tariff to its counterclaim, documents whose contents are alleged in a cause of action and whose authenticity is unchallenged by either party may be considered by the Court when ruling on a Rule 12(b) (6) motion. In re Stac Elecs. Sec. Litig., 89 F.3d 1399, n. 5 (9th Cir. 1996), cert. denied sub nom, Anderson v. Clow, 117 S.Ct. 1105 (1997). Interpretation of tariff duties is a question of law for the court. Atchison, Topeka, and Santa Fe Ry. Co., 725 F.2d at 470.

After examining FCC Tariff No. 1, the authenticity of which is unchallenged by either party, the Court can find no

tariff duty to provide call records, timely or otherwise, in the provision of transport services. (Tariff §§2.5.1-.6 and 5.4.3.) Moreover, the FCC has ruled that billing and collection services, which include the provision of call records, are controlled not by tariffs but by outside contracts. AT&T Dial-It 900 Servs., 4 F.C.C.D. 3429, 3433-34 (F.C.C. April 12, 1989). Accordingly, to the extent that MRO's pleadings seek relief for violation of the tariff, the first counterclaim is dismissed under Rule 12(b) (6).

2. Second Counterclaim - Breach of the Purported October 1995 Contract

MRO's second counterclaim alleges that AT&T breached a duty to provide readable, billable call records under a contract purportedly executed in October 1995. The Court finds that this counterclaim, in both its original and amended form, should be dismissed pursuant to Rule 12(b) (6).

In its original form, the counterclaim asserted that the provision of call records by AT&T was a "tariffed transport service" or at least one "in connection therewith." (MRO's Answer ¶57.) MRO further alleged that AT&T's failure to provide this tariffed service constituted the breach of a contract purportedly executed in October 1995. (Id.) AT&T correctly points out, however, that any such claim would be barred by the filed tariff doctrine. As stated, *supra*, the terms and duties of a tariff cannot be varied or enlarged by any contract. Keogh, 260 U.S. at 163. Thus, even assuming *arguendo* the truth of MRO's allegations, the alleged October 1995 contract could not vary the terms of the tariff.

Even in its amended form, MRO's second counterclaim fails to survive a Rule 12(b) (6) motion to dismiss. In its papers, MRO proposes, among other things, the deletion of all references to FCC Tariff No. 1. (Def.'s Opp. at 16.) Presumably, this would reconfigure MRO's second counterclaim as a straightforward allegation that AT&T's alleged failure to provide call records constituted a breach of contract. However, the amended counterclaim fails to allege any facts indicating the formation of the purported October 1995 contract.

In order to survive a motion to dismiss, a claimant asserting a contract breach must present the facts necessary to establish contract formation. Snyder v. Viani, 885 P.2d 610, 613 Nev. 1994); accord OnTap Premium Quality Waters, Inc. v. Bank of N. Ill., N.A., 634 N.E.2d 425, 429 (Ill. App. Ct. 1994) ("[i]n the absence of supporting facts," general allegations regarding contract formation "may not be admitted as true by a motion to dismiss"). Here, MRO does not present any "specific facts" indicating the execution of an express agreement.[5]

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[5] AT&T correctly asserts that MRO's alleged October 1995 contract must, as a matter of law, be an express contract rather than one implied in fact. An action cannot lie on an implied contract where there exists between the parties an express contract covering the same subject matter. Klebe v. U.S., 263 U.S. 188, 192 (1923); Western States Constr., Inc. v. Michoff, 840 P.2d 1220, 1224 (Nev.1992); Ewing v. Sargent, 482 P.2d 819, 823 (Nev. 1971). MRO concedes that the provision of call detail is already governed by two written agreements: the AT&T-ITA Contract and the MRO-ITA Contract. (Def.'s Answer ¶¶4, 73; Touton Decl. Exs. D & E.) Accordingly, the following analysis

MRO first alleges that two letters, dated October 11, 1995, and October 12, 1995, (Def.'s Answer, Ex. A), demonstrate the existence of an October 1995 contract that imposed "an independent obligation" to provide call records. (Def.'s Opp. at 16.) However, perusal of these letters reveals no facts supporting contract formation. Instead, as AT&T points out, these communications seem to contain things such as requests by MRO for the transferal of AT&T 900 telephone numbers. (Id.) While the nonmovant does not need to convince the court of the persuasiveness of her evidence, Waldridge v. American Hoechst Corp., 24 F.3d 918, 921 (7th Cir. 1994), she must nevertheless direct the court's attention to specific, triable facts within submitted documents, as opposed to making general references. Fed. R. Civ. P. 56(e); Nissho-Iwai American Corp. v. Kline, 845 F.2d 1300, 1307 (5th Cir. 1988) (reference to matters set forth in deposition, without specific page or line numbers, was not a designation of "specific facts").

MRO also presents a September 18, 1995, letter from AT&T's counsel to MRO that allegedly contains factual statements and averments that chronicle the past formation of a contract. (Archer Decl. Ex. E) But examination of this September letter again reveals a missive devoid of relevant factual evidence. Instead, the letter indicates an attempt by AT&T to document a prior *proposal* by MRO to maintain transport services after the termination of the billing agreement. (Id.) Apparently, AT&T found this proposal to be so "confusing" that it directed MRO to provide written

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will be limited solely to the alleged formation of a third express agreement in October 1995.

clarification. (Id.) Like the October letters, the September letter presents no facts indicting the elements of contract creation, viz., offer, acceptance, mutuality, definite and material terms, and consideration. In re Estate of Kern, 823 P.2d 275, 276 (Nev. 1991); see generally Restatement (Second) Contracts §§17, 50, 71 (1979). In other words, the September letter is not "significantly probative" enough so as to permit a reasonable trier of fact to find in favor of MRO. Liberty Lobby, Inc., 477 U.S. at 249-50. Accordingly, the Court rejects MRO's unsupported allegation that the failure to provide call records breached a contract purportedly executed in October of 1995 and grants AT&T's motion to dismiss as to this counterclaim.

3. Third Counterclaim-- Civil Contempt

The Court finds that MRO's request to have AT&T held in civil contempt for violation of this Court's September 1, 1995, Minute Order (Order, attached as Ex. B, Def.'s Answer) should also be dismissed for failure to state a claim. Civil contempt occurs where a party fails to comply with a court order. Vertex Distrib. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 891 (9th Cir. 1982). The Court's Minute Order states in pertinent part that the "existing 900 numbers provided by AT&T may be used by Plaintiff [MRO] with another carrier for purposes of arranging a new billing services agreement." The purpose of this Order was to allow MRO, upon termination of the AT&T-MRO billing services agreement, to: (1) continue using AT&T's transport services for the same telephone numbers and (2) arrange for the provision of billing services from a different business entity. MRO would have this Court reinterpret its own Order so as to impose an affirmative duty upon AT&T to provide call

records directly to MRO. This was not the intent of this Court.

Moreover, even construing the language of the Minute Order in the manner most favorable to MRO, AT&T has the protection of the "substantial compliance" defense to civil contempt. National Adver. Co. v. City of Orange, 861 F.2d 246, 250 (9th Cir. 1988). "If a violating party has taken 'all reasonable steps' to comply with the court order, technical or inadvertant [sic] violations of the order will not support a finding of civil contempt." General Signal Corp. v. Donallco, Inc., 787 F.2d 1376, 1379 (9th Cir. 1986) (citations omitted). Here, it is undisputed both that AT&T continued to supply transport services to MRO after issuance of the Minute Order and that MRO was able to contract with ITA for billing services. AT&T's conduct, at the very least, constituted "substantial compliance" with this Court's Order. Therefore, AT&T's motion to dismiss MRO's third counterclaim for civil contempt is granted.

4. Fourth Counterclaim-- Negligence

The Court also dismisses MRO's claim for negligence. MRO claims that AT&T breached a duty of care by failing to provide tariffed transport services, such as the provision of readable call records, as required by: (1) the alleged AT&T-MRO October 1995 contract; (2) FCC Tariff No. 1; (3) this Court's September 1, 1995, Minute Order; and (4) the AT&T-ITA agreement of April 26, 1993, which allegedly treated MRO as a third-party beneficiary. For the reasons mentioned, *supra,* the Court need only consider MRO's negligence claim

with regard to a duty purportedly created by MRO's status as a third-party beneficiary of the AT&T-ITA Contract.[6]

Contrary to AT&T's assertions, Nevada has followed California's lead in holding that a wrongful act, committed in the course of a contractual relationship, may give rise to both tort and contract remedies. Hilton Hotels Corp. v. Butch Lewis Prods,. Inc., 862 P.2d 1207, 1209 (Nev. 1993), citing Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1334 (Cal. 1980). Thus, MRO may sue in tort for the negligent manner in which a contractual duty is performed or for the failure of the other contracting party to perform such a duty. Eads v. Marks, 249 P.2d 257, 260 (Cal. 1952).

However, AT&T correctly points out that MRO has failed to provide any facts supporting the existence of a contractual duty, on AT&T's part, to provide call records to MRO as a third-party beneficiary. In order to prevail on a negligence theory, a plaintiff must establish that: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the breach was the legal cause of the plaintiff's injury; and (4) the plaintiff suffered

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[6] A negligence action may not proceed on the basis of FCC Tariff No. 1, since MRO has failed to allege facts demonstrating the existence of any tariff duty to provide call records. (See Discussion, Section D.1.) Similarly, negligence cannot arise from breach of the purported October 1995 contract, since MRO has failed to allege facts establishing the elements of contract formation. (See Discussion, Section D.2.) Finally, MRO cannot allege the existence of a duty to provide call records flowing from the September 1, 1995 Minute Order, since that Order patently did not provide for such a duty. (See Section D.3.)

damages. Scialabba v. Brandise Const. Co., Inc., 921 P.2d 928, 930 (Nev. 1996) (citing Perez v. Las Vegas Medical Ctr., 805 P.2d 589, 590 (Nev. 1991)). Here, MRO fails to show any contractual duty upon which a duty in tort could be imposed upon AT&T. That is, MRO fails to show that AT&T owed any duty of care to MRO to provide call records under the AT&T-ITA Contract.

The AT&T-ITA Contract, by its very terms, is governed by New Jersey law. (AT&T-ITA Contract ¶10.G.)[7] In New Jersey, "[t]he principle that determines the existence of a third-party beneficiary status focuses on whether the parties to the contract intended others to benefit from the existence of the contract, or whether the benefit so derived arises merely as an unintended incident of the agreement." Broadway Maintenance Corp. v. Rutgers, State University, 447 A.2d 906, 908 (N.J. 1982). Failure to show the required party intent will render the third party an incidental beneficiary without contractual standing. Air Master Sales Co. v. Northbridge Park Co-op., 748 F. Supp. 1110, 1117 (D.N.J. 1990); Broadway Maintenance, 447 A.2d at 909. This intent to provide for a third-party beneficiary may be gleaned from the text of the agreement itself. Insulation Contracting and Supply v. Kravco, Inc., 507 A.2d 754, 758

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[7] Paragraph 10.G. of the AT&T-ITA Contract states: "This agreement shall be construed in accordance with and governed by the local laws of the state of New Jersey." This creates the rather curious result of this Court having to dispose of the third-party beneficiary issue under New Jersey law, while determining the viability of a resultant tort claim flowing from any contractual breach according to Nevada law, due to its diversity jurisdiction. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) .

(N.J. Super. Ct. App. Div. 1986). Here, the AT&T-ITA Contract states that "[t]his Agreement shall not create for, nor give to, any third party any claim or right of action against AT&T that would not arise without this agreement." (AT&T-ITA Contract ¶4.D.) Pursuant to these strictures, MRO simply cannot claim third-party beneficiary status as a matter of law. See Grant v. Coca-Cola Bottling Co., 780 F. Supp. 246, 249 (D.N.J. 1991) (interpreting New Jersey law) (dismissing third-party beneficiary claim pursuant to Rule 12(b) (6) since plain language of agreement did not grant or impliedly confer third-party beneficiary rights). Consequently, the Court grants AT&T's motion to dismiss as to this counterclaim.

5. Fifth Counterclaim- Breach of Contract for the Benefit of MRO as Third-Party Beneficiary

As originally filed, MRO's fifth counterclaim alleged that AT&T failed to provide call records, as required by the AT&T-ITA Contract, of which MRO was a third party beneficiary. (Def.'s answer ¶73) This counterclaim is merely a reprise of the third party beneficiary issue raised in MRO's previous claim (negligence) and is dismissed for the same reasons delineated, *supra*, by the Court.[8]

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[8] Contrary to AT&T's assertion, this counterclaim is not otherwise barred by the filed tariff doctrine. As AT&T admits in its submitted papers, call records are non-tariffed items. (Pl.'s Reply at 7; Gatto Reply Decl. ¶7); see AT&T Dial-It 900 Servs., 4 F.C.C.D. at 3433-34 (billing and collection services, which include the provision of call records, are controlled not by tariffs but by outside contracts).

The Court also finds that MRO's related, proposed amendments fail to allege a cognizable legal theory. In its Opposition, MRO twice requests leave to file an Amended Complaint joining ITA as an "involuntary plaintiff" and suing in ITA's name, apparently under the AT&T-ITA Contract. (Def.'s Opp. at 15 and 20). This, MRO asserts, would "resolve" the third-party beneficiary issue. (Def.'s Opp. at 20.) MRO, however, misunderstands the applicable law.

First, pursuant to Federal Rule of Civil Procedure 19, "[t]he involuntary plaintiff doctrine applies only when there is a relationship between the plaintiff and the absentee such that the absentee must allow the use of its name as plaintiff to enable the extant plaintiff to secure relief." 4 James Wm. Moore, Moore's Federal Practice §19.04 [4] [b] (3d ed. 1998); see Followay Prods., Inc. v. Maurer, 603 F.2d 72, 74 (9th Cir. 1979) (strict confinement to situations where there is no other way to effect justice). The involuntary plaintiff doctrine has been used almost exclusively in patent and copyright infringement cases, Caprio v. Wilson, 513 F.2d 837, 839 (9th Cir. 1975), and flows from "the ancient rule that the exclusive licensee of a patent or a copyright must bring an infringement action in the name of the owner of the patent or copyright." Followay Prods., Inc., 603 F.2d at 74 (citations omitted). MRO fails to present any case law to suggest why this Court should extend this traditionally restricted doctrine to what is, in essence, a standard breach of contract claim. Accordingly, this Court declines to do so.

Second, AT&T correctly asserts that even if ITA was to sue or be joined in this action, a contract claim for timely, legible call records would fail as a matter of law. The AT&T-ITA Contract explicitly states that "the reports and services

[including call records] are provided on an "as is" basis." (AT&T-ITA Contract ¶4.A.) More importantly, the agreement states that, with the exception of certain situations inapposite to this case, that:

> "AT&T shall not be responsible for any damages, whether or not foreseeable, that are sustained by you and arise from AT&T's performance or nonperformance of any work or service *(including the provision or non-provision of reports and services)*, regardless of the form of action. . . AT&T shall not be liable for any incidental, indirect, special or consequential damages (including but not limited to, lost profits or revenues or increased cost of operations), whether or not AT&T has been advised of the possibility of such damages." (emphasis added)

(AT&T-ITA Contract ¶4.B.) Accordingly, even if MRO were able to join ITA as an involuntary plaintiff, any contract claim it could assert would fail.

For the foregoing reasons, the Court grants AT&T's motion to dismiss MRO's fifth counterclaim MRO fails to allege facts sufficient to demonstrate the viability of its third-party beneficiary and involuntary plaintiff arguments.

6. MRO's Sixth Through Ninth Counterclaims

The Court finds that MRO's sixth through ninth counterclaims duplicate those claims asserted in the Prior

Action. These claims were dismissed in their entirety, either on dispositive motions or during the May 1998 trial held by this Court in the prior action. Accordingly, MRO's current counterclaims are barred under the doctrine of res judicata. Res judicata applies when an earlier lawsuit: (1) involved the same claims; (2) reached a final judgment on the merits; and (3) involved the same parties or their privies. Nordhorn v. Ladish Co., Inc., 9 F.3d 1402, 1404 (9th Cir. 1993).[9] The Prior Action was resolved, in relevant part, by the grant of a Rule 50 judgment as a matter of law and involved the same parties. Thus, the only issue that merits close examination is the "same claims" element.

a. Same Claims Under Res Judicata Doctrine

Courts in the Ninth Circuit will determine whether a claimant has raised the same claims as those raised in earlier proceeding by examining such criteria as: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of

---

[9] AT&T correctly points out that before the Court issued a judgment in the Prior Action, the Court could have dismissed the duplicate counterclaims for reasons of judicial efficiency. Serlin v. Arthur Andersen & Co., 3 F.3d 221, 223 (7th Cir. 1993); see Pacesetter Systems, Inc. v. Medtronic, Inc., 678 F.2d 93, 95 (9th Cir. 1982) (upholding trial court's dismissal of claims duplicative of action already pending in district court). However, given the fact that the Prior Action has already been adjudicated, the proper tool for the Court to now use is the doctrine of res judicata.

the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. Nordhorn, 9 F.3d at 1405.

Analyzing MRO's remaining counterclaims, *in seriatim,* pursuant to the first and third criteria laid out in Nordhorn, it is evident that further adjudication would disturb the disposition of identical matters addressed in the Prior Action. MRO's sixth counterclaim (Def.'s Answer ¶¶75-89), alleging damages flowing from AT&T's transfer of liability for all "uncollectibles" and "chargebacks" occurring more than 90 days after the close of billing, duplicates MRO's seventh and fifteenth claims in its Amended Complaint of the Prior Action. (Am. Compl. ¶¶78-90, attached as Ex. G, Touton Decl.) Likewise, MRO's seventh counterclaim (Def.'s Answer ¶¶90-95), which requests recovery for allegedly "duplicate" and "erroneous" chargebacks, reiterates the same allegations of contract breach laid out in MRO's sixth claim of relief in the Amended Complaint. (Am. Compl. ¶¶74-77.) The eighth counterclaim (Def.'s Answer ¶¶96-101), alleging that AT&T committed a breach of contract by refusing to consent to the assignment of the billing services agreement, mirrors the fifth claim for relief brought in the Prior Action. (Am. Compl. ¶¶70-73.) Lastly, MRO's ninth counterclaim, citing violation of 47 U.S.C. §§201 and 202 due to AT&T's alleged failure to allow MRO to change termination points for calls to its 900 programs (Def.'s Answer ¶¶102-08), reproduces MRO's termination point allegations raised in the fifth and nineteenth claims of the Prior Action. (Am. Compl. ¶¶70-73 and 125-37.) Accordingly, both proceedings involved challenges to identical rights; any adjudication of MRO's remaining

counterclaims would disturb this Court's dismissal of MRO's claims, on the merits, in the Prior Action.

MRO asserts that its counterclaims are not the "same claim" for res judicata purposes since they "cover different time periods," viz., MRO's present counterclaims allege legal injuries sustained after the filing of papers in the Prior Action. (Def.'s Opp. at 21.) However, the mere passage of time does not effect *per se* a "substantial" change of the evidence sufficient to support new, conceptually distinct causes of action. Instead, the advance in time must be accompanied by a fundamental change in the nature or quality of the alleged activity. See Fund for Animals, Inc. v. Lujan, 962 F.2d 1391 (9th Cir. 1992) (action not barred by res judicata since bison management plans were approved at separate times and regarded different governmental conduct).

The Court finds that MRO's sixth through ninth counterclaims raise the same claims as those made by MRO in the Prior Action. These counterclaims are accordingly barred by the doctrine of res judicata.

IV. CONCLUSION

IT IS THEREFORE ORDERED that Plaintiff AT&T Corporation's Motion for Summary Judgment and To Dismiss MRO's Nine Counterclaims (#7A) is GRANTED as to AT&T Corporation's First Claim for unpaid tariff charges in the amount of $188,870.71.

IT IS FURTHER ORDERED that Plaintiff AT&T Corporation's Motion for Summary Judgment and to Dismiss MRO's Nine Counterclaims (#7A) is GRANTED as to

Plaintiff AT&T's Corporation's request to dismiss all nine of Defendant MRO's Counterclaims.

IT IS FURTHER ORDERED that the Clerk of Court shall enter Judgment in favor of Plaintiff AT&T and against Defendant MRO accordingly.

DATED: October 30, 1998

/s/_____
PHILIP M. PRO
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed November 3, 1998]

No. CV-S098-227-PMP (RLH)

AT&T CORPORATION,	)
Plaintiff,	)
	)
MRO COMMUNICATIONS, INC.,	)
	)
Defendant.	)
	)

JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiff's Motion for Summary Judgment and To Dismiss Defendant MRO's Nine Counterclaims is GRANTED

as to AT&T Corporation's First Claim for unpaid tariff charges in the amount of $188,870.71.

IT IS FURTHER ORDERED that Plaintiff AT&T Corporation's Motion for Summary Judgment and To Dismiss Defendant HRO's Nine Counterclaims is GRANTED as to Plaintiff AT&T Corporation's request to dismiss all nine of Defendant MRO's Counterclaims.

JUDGMENT IS HEREBY ENTERED in favor of Plaintiff and against Defendant.

November 3, 1998

LANCE S. WILSON, Clerk

/s/_____
(By) Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed February 4, 2000]

No. 98-17348
D.C. No. CV-989-00227-PMP

AT&T CORPORATION, *Plaintiff-counter-defendant - Appellee*,	)
v.	)
MRO COMMUNICATIONS, INC., *Defendant-counter-plaintiff- Appellant*.	)

ORDER

Before: CHOY, SCHROEDER, and ALARCON, Circuit Judges.

The panel has voted to deny defendant-appellant's petition for rehearing. Judge Schroeder has voted to deny the petition for rehearing en banc. Judge Choy and Judge Alarcon recommend that the petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed July 10, 1998]

NO. CV-S-98-00227-DWH (LRL)

AT&T CORP.,
Plaintiff,

v.

MRO COMMUNICATIONS, INC.,
Defendant.

MRO COMMUNICATIONS, INC.,
Counter-Plaintiff and Defendant,

v.

AT&T CORP.,
Counter-Defendant.

MRO'S OPPOSITION TO AT&TS MOTIONS FOR SUMMARY JUDGMENT AND TO DISMISS MRO'S COUNTERCLAIMS; DECLARATIONS OF DAVID L. KAHN AND RICHARD J. ARCHER.

DECLARATION OF DAVID L. KAHN

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

David Kahn declares that the following is true and correct.

1. I am the President of Plaintiff MRO Communications, Inc. ("MRO"). I am also a practicing attorney duly admitted to the Bar of the State of California. If called as a witness I could testify that the following statements are true and correct of my personal knowledge.

2. Based upon AT&T's repeated past 900 billing errors, MRO believes that AT&T's monthly 900 invoices to MRO for the time period covered by AT&T's Complaint (i.e., October, 1995 through January 1998) incorrectly calculated the 900 tariff charges due from MRO; and that MRO's discovery from AT&T will prove this. As set forth in Exhibit A to the this Declaration ("Decl."), every single one of AT&T's 900 invoices to MRO (which showed an unpaid balance of $275,058.67 on AT&T's January 1, 1998 invoice) contains amounts for 900 billing service charges or chargebacks pursuant to the May 2, 1989 BSA. This is evidenced by the circled amounts on such invoices for October, 1995 thru December, 1997 contained in Exhibit A to

this Decl. In numbered paragraph 8 of AT&T's Complaint, AT&T represented that MRO, through December, 1997, had an unpaid balance for tariffed transport charges of $275,058.67, which is the amount set forth in AT&T's January 1, 1998 900 invoice to MRO (the second to last page of Exhibit A to this Decl.). According to AT&T's February 1, 1998 900 invoice to MRO, the $275,058.67 of MRO's alleged unpaid balance for tariffed transport charges (the last page of Exhibit A to the this Decl.) had increased to $276,628.64 as of February 1, 1998. However, AT&T now asserts (7:22-24) that MRO's unpaid tariffed transport charges is only $188,870.71 as of February 1, 1998, instead of $276,628.64; a difference of $87,757.93, or approximately one-third less than the amount claimed by AT&T in its Complaint in this Action and the amount set forth in AT&T's February 1, 1998 invoice to MRO.

Teri Gatto's Declaration shows significant errors in AT&T's 900 invoices to MRO. For example, contrary to the amounts stated in AT&T's Complaint in this Action, Exhibit D to Teri Gatto's Declaration shows that AT&T's invoices to MRO for monthly tariff service charges for November, 1997 through February, 1998 totaled $6,000, which were overstated by AT&T by $2,750, or 85%. In addition, Exhibit D to Teri Gatto's Declaration also shows that AT&T's bulk billing penalties to MRO in AT&T's invoices for October, 1997 through December, 1997 totaled $5,589.60, instead of the correct amount of $1,396.04; for an overcharge to MRO for those months of 300%!

3. AT&T itself has admitted in communications to MRO, kept in the ordinary course of MRO's business (and produced by AT&T to MRO during the course of litigation of

the related Action), that AT&T has erroneously billed MRO for 900 tariffed transport charges. More specifically, as set forth on page 2 of Exhibit B to this Decl., AT&T billed MRO during one month for 900 tariffed charges of $4,911.23 when the correct amount of such 900 tariffed charges were $2,911.39, for an overcharge to MRO of 69%. In fact, page 1 of that same document shows that for just one 900 caller to just one of MRO's 900 numbers for just one month, AT&T paid MRO $3,279.00, instead of $7,278.75, for an underpayment by AT&T to MRO of more than 122%.

4. AT&T's 900 billings to MRO have been so erroneous that AT&T even billed MRO for chargebacks for 900 numbers that did not even belong to MRO. Or, as stated in Exhibit C hereto, MRO's May 12, 1993 letter to AT&T, kept in the ordinary course of MRO's business (and produced by AT&T to MRO during the course of litigation of the related Action), AT&T has erroneously billed MRO for chargebacks for 900 numbers that did not even belong to MRO.

5. AT&T's 900 billings have been so erroneous in the past that on at least two separate occasions (in April, 1992 and in April, 1996), AT&T offered to every one of its 900 customers a refund because of AT&T's duplicate chargebacks to its customers. For example, as stated in Exhibit D hereto, which I received from AT&T shortly after April 26, 1996 in the ordinary course of Audio Entertainment Network's business, I was told by two AT&T employees that the purpose of that document was to settle duplicate 900 chargeback claims against AT&T, and that AT&T was making a duplicate chargeback refund and settlement agreement "across the board" to its 900 customers; just as it had in April, 1992. In

other words, as of April, 1996 AT&T's erroneous 900 chargeback problem still existed.

6. The call data (i.e., the calling telephone number and the date and duration of the call) collected by AT&T while providing 900 transport services is part of AT&T's 900 tariffed transport services. This information was supposed to be provided by AT&T to MRO as part of AT&T's 900 tariffed transport services, because it is a "practice and/or regulation affecting such practice" which was required to be tariffed pursuant to Section 203(a) of the Federal Communications Act.

7. In the instant case (unlike in the AT&T 900 DIAL-IT Services proceeding), MRO did seek a transmission path from AT&T in order to provide an information service to MRO's customers. MRO did not obtain AT&T's 900 transmission service "only in order to obtain substantive information from AT&T". MRO obtained AT&T's 900 transport services to MRO's own facilities and equipment so that (i) MRO could utilize its facilities and equipment to provide the 900 caller with the information desired by such caller, and (ii) MRO would not have to obtain essential 900 transport services from another 900 carrier. In other words, AT&T's 900 transport services were essential to MRO so that MRO could provide on its own facilities and equipment the information desired by MRO's 900 caller.

8. In the instant case (unlike in the AT&T 900 DIAL-IT Services proceeding), AT&T's provision of such information (i.e., the telephone number called, and the date and duration of the call) is incidental to the provision of basic 900 transport service by AT&T. In this case, there is no

provision by AT&T of non-telecommunications information to MRO, let alone such information being "the essential service provided" to MRO. In other words, in this case, MRO obtained AT&T's 900 transmission service in order to facilitate MRO's "own enhanced service"; i.e., billing and collection services to the 900 customer. In this case, MRO did not obtain "additional, different, or restructured information" from AT&T.

9. AT&T has always interpreted its 900 Tariff as including the provision of the calling party's telephone number and the date and duration of the call as part of AT&T's 900 tariffed transport services. For example, AT&T's lawyers, at the time MRO was negotiating AT&T's tariffed 900 transport services, told MRO that such information was part of AT&T's 900 tariffed transport services. More specifically, AT&T's lawyers stated on page 2 of their September 18, 1995 letter to MRO:

> "Under one arrangement [for 900 tariffed transport services], MRO would directly or indirectly deliver to Info Services [the third party biller, like ITA] the periodic call information received from AT&T regarding the 900 numbers. This would not appear to involve any change in the present tariffed transport service provided to MRO by AT&T, and the monthly invoice, call detail reports, and executive summary for calls made to the 900 numbers would continue to be prepared and delivered to MRO by AT&T." (Emphasis added.)

10. AT&T's 900 call detail reports and executive summaries provide the calling telephone number, the date and time of the 900 call, and the duration of the 900 call; which is the information needed to enable MRO to bill its caller for such 900 call.

11. AT&T did not comply with the Court's Order because MRO was not allowed to use such 900 numbers as a result of AT&T's willful actions for a period of approximately three months. Moreover, ITA has told me that AT&T selectively discriminated against MRO, compared to AT&T's other customers with ITA.

12. The Sixth through Ninth Counterclaims in this lawsuit cover the time period after the filing of MRO's Amended Complaint in February, 1995 against AT&T in the related Action.

Executed under penalty of perjury July 10, 1998:

/s/_____
David L. Kahn

APPENDIX F

EXHIBIT C TO MRO'S ANSWER AND COUNTERCLAIM OF MARCH 12, 1998

MRO Communications, Inc.
5190 So. Valley View Blvd.
Suite 106
Las Vegas, NV 89115
Phone: (702) 736-2242
Fax: (702) 736-3763

November 7, 1997

Mr. Marvin Lurie
General Manager
AT&T 900 Service

By Telecopier (908) 231-6342

Dear Mr. Lurie:

I understand that in September, 1995 AT&T was ordered by the U.S. District Court in Las Vegas to permit MRO to use its existing 900 numbers so that another company could provide MRO with billing services for such 900 numbers.

Since November, 1995 through early July, 1997 AT&T provided to MRO's billing company, ITA, the data necessary to enable ITA to bill for calls to MRO's 900

numbers. I understand that such services by AT&T have recurrently been below industry standards in terms of the percentage of readable records containing the necessary data to enable ITA to bill for calls to MRO's 900 numbers.

However, from July 1997, to October, 1997 ITA has not received any readable billable call records whatsoever for MRO's 900 numbers! I have had numerous conversations with Duane Ward and Eric Anderson of AT&T over a period of many weeks in unsuccessful attempts to have this problem solved. Every promised date made by these individuals for correcting this problem has been broken. In addition, I understand that the President of our company, David Kahn, has had numerous telephone conversations with AT&T's lawyers (Jennifer Leuba and Dermot Bree) over a period of more than three months in additional unsuccessful attempts to correct this problem.

I understand that AT&T's excuse is that one ITA employee failed to return a telephone call to AT&T in early July, 1997, and thereafter AT&T simply ceased providing the data necessary for ITA to bill for calls to MRO's 900 numbers; in spite of ITA's and MRO's complaints to AT&T several times in a week for the past four months.

The result of AT&T's failure to provide any readable billable call records for MRO from July, 1997 to October, 1997 is that MRO has not received any income for calls to such 900 numbers during this time period. Moreover, even if AT&T were to correct the problem almost immediately, virtually all of the call records to be billed would be at least two months old, and therefore would not be billable to ITA or any company.

It seems that AT&T's failure to fulfill their obligation to provide readable billable call records for MRO's 900 numbers from July to October, 1997 is simply another attempt by AT&T to drive MRO out of business. Therefore, unless AT&T takes some action within fifteen (15) days from the date of this letter to compensate MRO for its lost revenue as a result of AT&T's failure to provide ITA with readable billable call records from July, 1997 to October, 1997, MRO may have to commence additional legal action against AT&T.

Very truly yours,

/s/_____
George Burgard

GB:mk

cc: David Kahn
Richard Archer

(2)

Supreme Court, U.S.
FILED
APR 19 2000
CLERK

No. 99-1549

IN THE

Supreme Court of the United States

MRO COMMUNICATIONS, INC.,
A NEVADA CORPORATION,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
NOW AT&T CORP.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AT&T CORP. IN OPPOSITION

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*Counsel of Record

April 19, 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

16PP

QUESTION PRESENTED

Whether the Ninth Circuit correctly held that AT&T Corp.'s ("AT&T") billing and collection services were not subject to regulation under the Federal Communications Act, where the Federal Communications Commission has so held and where billing and services are not set forth in the applicable filed tariff?

STATEMENT REQUIRED BY RULE 29.6

AT&T has no parent company. No publicly held company owns 10 percent or more of AT&T's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT REQUIRED BY RULE 29.6	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
THE DECISIONS BELOW	3
REASONS FOR DENYING THE PETITION	4
CONCLUSION	11

TABLE OF AUTHORITIES

CASES	Page
American Tel. & Tel. Co. v. Central Office Tel., Inc., 524 U.S. 214, 118 S.Ct. 1956 (1998)	3
In re Audio Communications, Inc., 8 F.C.C.R. 8697 (1993)	6,9,10
In the Matter of AT&T Dial-It 900 Servs. and Third-Party Billing and Collection Servs. ("Dial-It"), 4 F.C.C.R. 3429 (1989)	5,6,7,9,10
Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 112 S.Ct. 2759 (1990)	4,7,8,9
McDonnell Douglas Corp. v. General Tel. Co. of Cal., 594 F.2d 720 (9th Cir.), *cert. denied*, 444 U.S. 839 (1979)	10
National Ass'n of Regulatory Util. Comm'rs v. FCC, 880 F.2d 422 (D.C. Cir. 1989)	10
Pan Am Petroleum Corp. v. Superior Court, 366 U.S. 656, 81 S.Ct. 1303 (1990)	9
In re Paul Ondulich, 5 F.C.C.R. 3190 (1990)	6
People of the State of Cal. v. FCC, 905 F.2d 1217 (9th Cir. 1990)	10
STATUTES AND RULES	
Ninth Circuit Local Rule 36-3	4,10

IN THE

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No. 99-1549

MRO COMMUNICATIONS, INC.,
A NEVADA CORPORATION,
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v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
NOW AT&T CORP.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AT&T CORP. IN OPPOSITION

STATEMENT OF THE CASE

The Ninth Circuit properly held in an unpublished opinion that the billing and collection services (including the call detail data records associated with those services) offered by AT&T for 900 number programs pursuant to contract are not subject to regulation under the Federal Communications Act, as the Federal Communications Commission ("FCC") repeatedly has held. This case does not involve any split among the circuits, any issues of national concern, or any conflict with the well-settled law regarding the filed tariff doctrine articu-

lated by this Court. Rather, the petition asks this Court to engage in simple error correction (which, in any event, is unwarranted) and therefore does not present an issue worthy of this Court's review.

In May 1989, Petitioner MRO Communications, Inc. ("MRO") began purchasing transport services for MRO's 900 number programs from AT&T. AT&T offered transport services to MRO pursuant to a tariff filed with the FCC, AT&T Tariff No. 1 (the "Tariff"). AT&T's transport services involve AT&T's supply of telephone lines over which voice and data are conveyed. (*See* Pet. App. at 22a.) Separately, MRO executed a non-tariffed Billing Services Agreement ("BSA") with AT&T in May 1989, whereby AT&T would bill and collect charges from the callers to MRO's 900 programs. AT&T then would remit the charges to MRO, less certain costs and a 10 percent fee based on the total charges billed to callers who called MRO's 900 number programs. (*See id.*) While provision of transport services is offered pursuant to a tariff and regulated by the FCC, the provision of billing services is offered pursuant to a contract and not regulated. (*See id.* at 22a-23a.)

In November 1992, MRO filed for bankruptcy protection, and in July 1993, MRO filed a lawsuit against AT&T arising out of the BSA and certain alleged violations of the Bankruptcy Code. In October 1995, AT&T terminated the BSA. MRO thereafter utilized billing and collection services from a different provider, International Telemedia Associates, Inc. ("ITA"), pursuant to a new contract that MRO executed with ITA. MRO continued to utilize AT&T's transport services for its 900 number programs. Separately, ITA had an agreement with AT&T pursuant to which AT&T provided ITA with certain call detail data used for the calculation and collection of billing charges to ITA's 900 number customers, such as MRO. (*See id.* at 23a.)

THE DECISIONS BELOW

On February 6, 1998, AT&T commenced this collection action based upon MRO's failure to pay more than $188,000 in monthly telephone bills for 900 call tariffed transport services that AT&T provided to MRO from January 1996 through February 1998. (*Id.* at 2a-3a.) MRO denied any liability in its answer and asserted a number of affirmative defenses and counterclaims. (*Id.* at 8a, 10a.)

AT&T moved for summary judgment on its collection claim based on the filed tariff doctrine and to dismiss MRO's counterclaims. In opposing AT&T's motion, MRO contended that AT&T was not entitled to collect its tariffed charges because of past errors relating to non-tariffed billing and collection services, and because AT&T had not provided certain call detail records within a reasonable time to MRO, as AT&T purportedly was required to do under the Tariff, between July 1997 and early October 1997. On November 3, 1998, the district court issued a well-reasoned thirty-two page opinion granting AT&T's motion for summary judgment and dismissing MRO's counterclaims. (*Id.* at 20a-54a.) MRO appealed.

On December 13, 1999, in an unpublished memorandum, the Ninth Circuit affirmed the district court's ruling. (*Id.* at 1a-19a.) The Ninth Circuit properly held that, under this Court's most recent pronouncement regarding the filed tariff doctrine, " 'the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext.' " (*Id.* at 5a (quoting *American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222, 118 S.Ct. 1956, 1962 (1998)).) The Ninth Circuit found that AT&T's evidence of the tariffed transport charges incurred by MRO was sufficient to warrant summary judgment. (Pet. App. at 3a-8a.)

The Ninth Circuit also rejected MRO's contention, in both its third affirmative defense and a number of its repetitive counterclaims, that AT&T's alleged failure to provide call detail records violated the terms of the Tariff and the Federal Communications Act. The Ninth Circuit reviewed the Tariff provisions that, according to MRO, required AT&T to provide call detail records to MRO, as well as the provisions of the Federal Communications Act upon which MRO relied. The Ninth Circuit correctly observed that under "the filed rate doctrine, '[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.' " (*Id.* at 9a (quoting *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126, 110 S.Ct. 2759, 2766 (1990) (brackets in original)).) The Ninth Circuit squarely rejected MRO's arguments, holding that "MRO's extrapolation of some duty on AT&T's part to provide call records is not supported by the language of the Tariff provisions or the statute to which MRO pointed." (Pet. App. at 9a.)

REASONS FOR DENYING THE PETITION

1. MRO contends that the Ninth Circuit failed to consider MRO's arguments below regarding a particular FCC decision, the applicability of the Federal Communications Act, and the Tariff. (Pet. at 3-6.) Those contentions are baseless and in any event do not raise any matter worthy of this Court's review. MRO points to no circuit split concerning the interpretation of the Tariff or the particular FCC decision upon which MRO relies. MRO does not suggest that the Ninth Circuit's unpublished decision established any groundbreaking rule of law regarding the filed tariff doctrine or any other binding precedent.[1]

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[1] Pursuant to the Ninth Circuit's Local Rule 36-3, unpublished decisions like this one "shall not be regarded as precedent and shall not be cited . . . except when relevant under the doctrines of the law of the case, res judicata, or collateral estoppel." Ninth Circuit Local Rule 36-3.

MRO misstates the record below and misconstrues the holdings of the Ninth Circuit as well as the FCC decision cited in its petition. Contrary to MRO's assertion (Pet. at 5-6), the Ninth Circuit did, in fact, consider MRO's arguments. Indeed, the Ninth Circuit specified that it had considered the matters raised in MRO's briefs, and that it had reviewed the Tariff and statutory provisions upon which MRO relies. (*See* Pet. App. at 8a-9a.)

Further, MRO misconstrues the FCC decision upon which it places great emphasis, *In the Matter of AT&T Dial-It 900 Servs. and Third-Party Billing and Collection Servs.* ("*Dial-It*"), 4 F.C.C.R. 3429 (1989). (Pet. at 3.) In *Dial-It*, the FCC was also clear in its rejection of the argument that MRO now advances. The FCC contrasted two kinds of services offered by AT&T: (1) transport service that AT&T provides to all subscribers of its services, who are billed and charged rates in accordance with the terms set forth in the filed Tariff, and (2) non-tariffed premium billing and collection services, pursuant to which AT&T billed and collected premium charges (set by subscribers) from callers to the subscribers' 900 number programs. The terms and conditions of AT&T's premium billing and charges were set forth in its contract with MRO—the BSA—*not* in the Tariff. Because competition in the billing and collection services was a "developing reality," particularly given the influx of "credit card companies, among others" that were entering the billing and collection market, the FCC concluded that "tariff regulation was unnecessary" to control billing and collection providers. *Dial-It*, 4 F.C.C.R. at 3433-34. The FCC squarely held that AT&T's 900 number billing service "is not a Title II common carrier service [under the Federal Communications Act], is subject to current and foreseeable competition and, as a result, is properly offered by AT&T on a non-tariffed basis." *Id.* at 3434.[2]

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[2] MRO takes out of context one statement in *Dial-It* where the FCC was summarizing an argument AT&T had made before the FCC, in

Since its *Dial-It* decision the FCC has refused every invitation to regulate billing and collection services, finding time and again that there was no merit to the argument that billing services (which include providing the call detail information that MRO has put at issue) must be regulated. *See, e.g., In re Paul Ondulich*, 5 F.C.C.R. 3190, 3190 (1990) (dismissing complaint alleging violation of the Federal Communications Act based on the supposed "bundling" of billing and transport services because third party billing services were not communications services offered pursuant to tariff); *In re Audio Communications, Inc.*, 8 F.C.C.R. 8697, 8697 (1993) (holding Sprint Telemedia's 900 billing and collection service was not governed by the Federal Communications Act.).[3]

MRO persists in confusing and conflating two distinct services—tariffed transport services on the one hand, and non-

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which AT&T noted that it did not obtain call detail data directly, but rather from local telephone companies (referred to as "local exchange carriers" or "LECs".) (Pet. at 3; *Dial-It*, 4 F.C.C.R. at 3432.) AT&T had noted that because there was not yet competition in billing services, the FCC required LECs to make call detail information available on a reasonable basis. Indeed, in the very next line of the FCC's *Dial It* decision after the line quoted by MRO (Pet. at 3), the FCC stated that "AT&T argues that the fact of competition for billing of IXC services in general indicates the presence of market forces sufficient to respond to excessive rates or practices by 900 service billing and collection providers." *Dial-It*, 4 F.C.C.R. at 3432. For that reason, the FCC did not find a need for regulation of billing services provided by carriers like AT&T. In any event, whether the FCC determined that LECs were required to provide billing information to carriers and third party billers is an issue entirely separate and distinct from whether the FCC subsequently imposed any obligation on carriers or other third party billers to give that same information to their subscribers.

[3] MRO also inappropriately relies on the FCC's discussion of AT&T's "Call Count" feature in the *Dial-It* decision (Pet. at 6-7). The FCC's discussion of billing and collection issues is an entirely separate and discrete section of the *Dial-It* decision, in which the FCC unequivocally held that billing and collection services should not be tariffed services. *See Dial-It*, 4 F.C.C.R. at 3431.

tariffed billing services on the other—that the FCC repeatedly has determined do not constitute one service. MRO does not complain that AT&T failed to provide it with call detail sufficient under the Tariff for transport services. Rather, MRO's petition centers on AT&T's purported failure to provide call detail records in connection with the billing services it separately contracted for and which were not tariffed. The FCC has refused to assume any regulatory authority over the billing services because there was and is available competition—any information provider dissatisfied with AT&T's services is free to subscribe to alternative billing providers, including credit card companies and other carriers. *Dial-It*, 4 F.C.C.R. at 3433-34. In fact, that is precisely what MRO did in this case. (*See* Pet. App. at 23a.)[4] The Ninth Circuit properly deferred to the FCC's rulings that billing services should not be regulated, and that decision does not warrant further review by this Court.

2. MRO also wrongly contends that the Ninth Circuit did not follow this Court's decision in *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 112 S.Ct. 2759 (1990), which held that a plaintiff is entitled to recover for damages relating to a defendant's failure to comply with the terms of the defendant's tariff. (Pet. at 8-9.) MRO does not contend that the Ninth Circuit disregarded the holding of *Maislin*, or announced some new law contrary to *Maislin*. Rather, MRO asserts, incorrectly, that the Ninth Circuit erred in applying *Maislin* in its unpublished memorandum. (Pet. at 8-9.)

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[4] MRO also argues that if billing services remained unregulated, then AT&T could "refuse to contract" with its customers to provide them with the call detail necessary to bill customers. (Pet. at 5.) That is a possibility —however unlikely—that is controlled by the market. If AT&T provided no call detail needed by its customers, it would lose them to the many competitors in the third party billing market. That is precisely why the FCC decided there was no need to regulate billing services. *See Dial-It*, 4 F.C.C.R. at 3433-34.

The Ninth Circuit was entirely correct in concluding that "MRO's extrapolation of some duty on AT&T's part to provide call records is not supported by the language of the Tariff provisions or the statute to which MRO pointed." (Pet. App. at 9a.) MRO relies on § 5.4.4 of the tariff, which it neglects to inform the Court, it did not raise in the district court. Indeed, MRO brought that Tariff provision to the Ninth Circuit's attention only in a letter submission after the parties had completed all briefing in the Ninth Circuit and the record had been filed. (*See id.*)

In any case, the Ninth Court considered and correctly rejected MRO's assertion that § 5.4.4 requires AT&T to provide call detail to MRO. (*Id.*) First, § 5.4.4 is an "optional feature" provided by AT&T for an additional tariff charge to which MRO did not subscribe and for which it was not charged.[5] Moreover, MRO had entered into a separate billing services contract with ITA, a third party biller, to obtain the call detail information at issue. (*Id.* at 23a)

Second, § 5.4.4 merely states that as part of AT&T's transmission of the call, AT&T would provide the "calling party number" or "billing number" in real time, a service akin to "caller ID." The plain language of § 5.4.4 does not state that AT&T would provide the kind of call record detail used with billing services, such as the duration of the call, the number of calls to a particular 900 program such as MRO's, or the

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[5] Tariff § 5.4.4.A provides in part that "The following conditions apply:

Info-2 is only available when Customer access to AT&T MultiQuest Service utilizes the Primary Rate Interface ("PRI") office function. The PRI is provided in AT&T Tariff F.C.C. No. 9.

Per caller number information delivered, Usage Charge $.01."

MRO never suggested in any of its submissions below that it could qualify for "Info-2" service, that it in fact subscribed to it, or that it paid for it – all of which MRO would have had to do as a matter of law under the filed tariff doctrine. *See Maislin*, 497 U.S. at 127, 110 S.Ct. at 2766.

or the frequency of calls made by the same caller. Accordingly, the Ninth Circuit properly applied well-established filed-tariff jurisprudence to reject MRO's arguments. *See Maislin*, 497 U.S. at 126, 110 S.Ct. at 2766 ("[t]he rights as defined by the tariff cannot be varied or enlarged..."); *Pan Am Petroleum Corp. v. Superior Court*, 366 U.S. 656, 666, 81 S.Ct. 1303, 1309 (1990) (same).

3. MRO next contends that the Ninth Circuit improperly held that billing services (including the provision of call detail records) by interexchange carriers like AT&T are not regulated, because the absence of Federal regulation would permit AT&T to simply refuse to provide billing services to certain customers, purportedly giving AT&T "monopoly leveraging" position in violation of §§ 201 and 202 of the Federal Communications Act. (Pet. at 10-11.) That contention is baseless. The FCC specifically found that there was a highly competitive market for billing services, and therefore there was no reason to subject billing services to the Federal Communications Act. *See Dial-It*, 4 F.C.C.R. at 3433-34 ("tariff regulation was unnecessary to control anticompetitive behavior" of carriers providing billing services because of the existence of a "competitive market" that included "credit card companies, among others," providing those services); *Audio Communications*, 8 F.C.C.R. at 8700 ("[T]he billing and collection services provided by IXCs [interexchange carriers like Sprint, MCI and AT&T] for IPs [information providers] is subject to even more competition than the billing and collection services provided by LECs in the *Detariffing Order* and by AT&T in the *AT&T Dial It Order* and thus there is even less reason to treat it as common carriage."). Further, nothing in the record below even remotely supports MRO's assertion that AT&T did or could engage in "monopoly leveraging." (Pet. at 10.) The FCC findings refute MRO's contention.

4. Finally, MRO contends that the issue of whether call detail records are provided "for or in connection with" com-

munications services under the Federal Communications Act is a matter of "national importance" because of an "overriding need for national Uniformity." (*Id.* at 11.) MRO nowhere explains why this issue, which the FCC has determined should be subject to the variety of the marketplace, requires uniformity. *See, e.g., Dial-It*, 4 F.C.C.R. at 3433-34; *Audio Communications*, 8 F.C.C.R. at 8700. Nor does it explain how there is any discrepancy in the existing law. MRO has not cited to any split or conflicting authority on whether billing services (including call detail) should be subject to the Federal Communications Act.[6] The Ninth Circuit did not view this to be an issue of significance, determining that it could be resolved by an unpublished opinion. *See* Ninth Circuit Local Rule 36-3. This Court should view this petition in the same light.

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[6] MRO cites several decisions purporting to require "uniformity" in the telecommunications industry (Pet. at 11), but not one of them supports its argument. *See, e.g., McDonnell Douglas Corp. v. General Tel. Co. of Cal.*, 594 F.2d 720 (9th Cir.), *cert. denied*, 444 U.S. 839 (1979) (refusing to find that billing practices of intrastate telephone service should be subject to anti-discrimination provision (§ 202) of Federal Communications Act); *People of the State of Cal. v. FCC*, 905 F.2d 1217, 1238-45 (9th Cir. 1990) (overturning FCC order pre-empting state law regulations); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422 (D.C. Cir. 1989) (refusing to impose national standards sought by FCC).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 99-1549

IN THE
SUPREME COURT OF THE UNITED STATES

MRO COMMUNICATIONS, INC.,
a Nevada corporation;
Petitioner,

v.

AMERICAN TELEPHONE &
TELEGRAPH COMPANY, now AT&T Corp.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Federal Communications Act require AT&T to provide 900 telephone call data to MRO because it is "...in connection with" AT&T's "communications services" (i.e., AT&T's tariffed 900 transport services)?

2. Does the FCA require AT&T to provide as part of its tariffed 900 services the telephone call data that is necessary in order to bill for such calls?

PARTIES TO THE PROCEEDING

Petitioner

The parent company of Petitioner MRO Communications, Inc. ("MRO") is Bellatrix International, Inc. a corporation which has shares issued to the public.

Respondent

The respondent is AT&T Corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES v

REASONS FOR GRANTING THE WRIT 1

I. THE NINTH CIRCUIT'S DECISION IS CONTRARY TO THE FCC'S DECISION IN AT&T DIAL-IT, 4 FCC RCD. NO 9, 3429 (1989), AND CONFLICTS WITH THE FEDERAL COMMUNICATIONS ACT ("FCA"), §§ 201-202, WHICH REQUIRES AT&T TO PROVIDE THE 900 TELEPHONE CALL DATA TO MRO BECAUSE IT IS"...IN CONNECTION WITH" AT&T'S "COMMUNICATIONS SERVICES" (I.E., AT&T'S TARIFFED TRANSPORT SERVICES) 1

II. BY HOLDING THAT MRO CANNOT RECOVER ITS DAMAGES UNDER THE FCA FOR AT&T'S REFUSAL TO PROVIDE THE 900 CALL DATA NEEDED TO BILL ITS CALLERS, THE NINTH CIRCUIT'S DECISION IS CONTRARY TO THE DECISION OF THIS COURT IN MAISLIN INDUSTRIES V. PRIMARY STEEL, 497 U.S. 116 (1990), AND ALSO CONFLICTS WITH §§ 201-202, 206-207 OF THE FCA 8

III. THE NINTH CIRCUIT'S RULINGS WOULD ENABLE AT&T (THE NATION'S LARGEST COMMUNICATIONS COMMON CARRIER) BY NOT TARIFFING CERTAIN SERVICES (WHICH ARE "CONNECTED" TO AT&T'S TARIFFED "COMMUNICATIONS" SERVICES") TO PREVENT AT&T'S TARIFFED COMMUNICATIONS SERVICES CUSTOMERS FROM UTILIZING SUCH TARIFFED SERVICES, UNLESS THEY AGREED TO AT&T'S CONTRACT TERMS 8

IV. THE NINTH CIRCUIT'S DECISION ALSO SUBSTANTIALLY AFFECTS A RULE OF NATIONAL IMPORTANCE; NAMELY, WHAT SERVICES ARE "...FOR OR IN CONNECTION WITH... COMMUNICATIONS SERVICES..." PURSUANT TO THE FCA, IN WHICH THERE IS AN OVERRIDING NEED FOR NATIONAL UNIFORMITY 9

CONCLUSION 10

TABLE OF CITED AUTHORITIES

Page

CASES:

In re AT&T 900 Dial-It Servs. and Third Party Billing and Collection Servs., 4 F.C.C.R. 3429 (1989) ..... passim

In re Audio Communications, 8 F.C.C.R. 8697 (1993) 5,6

In the Matter of Competition in the Interstate Interexchange Marketplace, FCC Docket No. 90-132 (1992) 7,9

In re Paul Ondulich, 5 F.C.C.R. 3190 (1990) 6

Maislin Industries v. Primary Steel, 497 U.S. 116, 111 L.ed.2d 94, 110 S.Ct. 2759 (1990) 8

STATUTES:

47 U.S.C. Section 206 8

47 U.S.C. Section 207 8

REASONS FOR GRANTING WRIT

I. THE NINTH CIRCUIT'S DECISION IS CONTRARY TO THE FCC'S DECISION IN AT&T DIAL-IT, 4 FCC RCD. NO 9, 3429 (1989), AND CONFLICTS WITH THE FEDERAL COMMUNICATIONS ACT ("FCA"), §§ 201-202, WHICH REQUIRES AT&T TO PROVIDE THE 900 TELEPHONE CALL DATA TO MRO BECAUSE IT IS "...IN CONNECTION WITH" AT&T'S "COMMUNICATIONS SERVICES" (I.E., AT&T'S TARIFFED 900 TRANSPORT SERVICES).

The Ninth Circuit's decision is contrary to the decision in In re AT&T Dial-It, 4 FCC Rcd. No. 9, 3429 (1989) at 3432 where the FCC stated:

> "A third party wishing to provide billing and collection services would require the LECs' name and address data bases to match calls to callers. AT&T notes that the Commission has required LECs to make call detail information available 'on a reasonable basis'."[1] (Emphasis

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[1]AT&T does not deny the accuracy of this quote from the Dial-It case, but instead asserts (Br. 6, n. 2) that " ... in the very next line of the FCC's Dial-It decision after the line quoted by MRO (Pet. At 3), the FCC stated that "AT&T argues that the fact of competition for billing of IXC services in general indicates the presence of market forces sufficient to respond to excessive rates or practices by 900 billing and collection providers." Dial-It, 4 F.C.C.R. at 3432. For that reason, the FCC did not find a need for regulation of billing services provided by carriers like AT&T."

First, the "next line of the FCC's Dial-It decision" referred to by AT&T does not in any way change the meaning of Petitioner's quotation from the Dial-It decision.

Second, as stated later in this section, the FCC's Dial-It holding, that AT&T's billing and collection services in that case, were not subject to tariff, was based on the factual foundation that AT&T's 900 billing services in that case were not tied to AT&T's

added.)

The Ninth Circuit's Memorandum entire discussion on this point is (Pet. at 9a):

> "MRO's extrapolation of some duty on AT&T's part to provide call records is not supported by the language of the Tariff provisions[2] or the statute [FCA] to which MRO pointed."

In this connection, AT&T doesn't deny that the Ninth Circuit overlooked the material point of fact that such call data is essential in order for MRO to be able to bill callers to MRO's 900 telephone numbers. An information provider ("IP") while purchasing 900 transport services from AT&T, cannot conduct its own billing, or arrange for billing services from a company other than AT&T, unless AT&T furnishes to the IP, or to the billing company, the calling telephone number, the date of the call, and the length of the call ("call data") (Pet.

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900 tariffed services for the same 900 telephone numbers, as they are in AT&T's 900 BSA in this case.

[2]In fact, the plain language of Section 5.4.4. of AT&T's Tariff No. 1 does provide for call records (i.e., "information forwarding") as part of AT&T's tariffed 900 transport services.

However, AT&T asserts (Br. 8):

"MRO relies on Section 5.4.4. of the tariff, which it neglects to inform the Court, it did not raise in the district court. Indeed, MRO brought that Tariff provision to the Ninth Circuit's attention only in a letter submission after the parties had completed all briefing in the Ninth Circuit and the record had been filed."

First, MRO did argue in the District Court that there was no competent evidence to support AT&T's assertion that the relevant portion of AT&T's Tariff was Section 5.4.3.

Second, contrary to AT&T's assertion (Br. 8), MRO through its agent, ITA, did elect, and pay for its tariffed "information forwarding" services pursuant to Section 5.4.4.

Third, contrary to AT&T's assertion (Br. 8-9), Tariff Section 5.4.4. information does provide for the frequency of calls because such information is provided on a "call by call basis".

Fourth, Tariff Section 5.4.4. clearly demonstrates that AT&T's call data is part of AT&T's tariffed transport services!

at 63a).

The call data must be part of AT&T's 900 tariffed services if the IP is to be able to bill its 900 calls. AT&T does not deny that if it is a matter of contract, then AT&T can refuse to contract with the IP, and the IP will be unable to bill its 900 calls. For such reasons, pursuant the FCA this call data is supposed to be provided by AT&T to MRO as part of AT&T's 900 tariffed transport services, because it is a "practice and/or regulation affecting such practice" which was required to be tariffed pursuant to the FCA §203(a) and §§201-202 because they are "for, or in connection with" AT&T's "communications services" (i.e., AT&T's 900 transport services).[3]

AT&T does not deny that its call data is the identical information that AT&T obtains while furnishing 900 tariffed transport services to MRO; which AT&T utilizes to determine MRO's 900 transport services charges (Pet. at 63a).

However, the district court stated (Pet. at 39a):

> "Moreover, the FCC has ruled that billing and collection services, which include the provision of call records, are controlled not by tariffs, but by outside contracts. AT&T Dial-It 900 Servs., 4 F.C.C.D. 3429, 3433-34"

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[3]AT&T asserts (Br. 7) that: "MRO also argues that if billing services remained unregulated, then AT&T could "refuse to contract" with its customers to provide them with the call detail necessary to bill customers. (Pet. at 5.) That is a possibility - however unlikely- that is controlled by the market."

AT&T is wrong. That possibility is not controlled by the market, but rather by the FCA. The reason is that if AT&T refuses to contract with the IP, the IP will be unable to bill its 900 calls. Therefore, pursuant the FCA this call data is supposed to be provided by AT&T to MRO as part of AT&T's 900 tariffed transport services, because it is a "practice and/or regulation affecting such practice" which was required to be tariffed pursuant to the FCA §§201-202, 203(a) because they are "for, or in connection with" AT&T's "communications services" (i.e., AT&T's 900 transport services).

AT&T doesn't deny that in reaching this conclusion, the district court completely ignored MRO's Opposition (Pet. at 61a-63a); which explained (i) the standard under Dial-It for determining whether call data are part of tariffed transport services, and (ii) the facts why MRO's 900 services from AT&T result in AT&T's call data being part of AT&T's tariffed transport services to MRO under that standard. None of those MRO undisputed facts (Pet. at 61a-62a) were mentioned by the district court in its one sentence conclusion.

AT&T's Opposition does not deny that the Ninth Circuit's Memorandum did not address MRO's specific contentions[4] that (1) AT&T's 900 call data is essential in order for MRO to be able to bill for its 900 calls, (2) according to the FCC's own standard in In re Dial-It Servs. and Third Party Billing and Collection Servs., 4 F.C.C.R. 3429 (1989), AT&T's call data is part of AT&T's tariffed transport services, (3) that the FCC's Dial-It standard (for determining whether a service is part of tariffed services) was accurately quoted by MRO[5] in its Petition (Pet. 6), and (4) as stated in MRO's Petition (Pet. 6-8), it is undisputed that under that FCC standard, AT&T's call detail is part of AT&T's transport services.[6]

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[4]Instead, AT&T makes the general inapplicable assertion (Br. 5) that, in fact, "Contrary to MRO's assertion (Pet. at 5-6), the Ninth Circuit did, in fact, consider MRO's arguments. Indeed, the Ninth Circuit specified that it had considered the matters raised in MRO's briefs, and that it had reviewed the Tariff and statutory provisions upon which MRO relies. (See Pet. App. at 8a-9a.)"

[5]AT&T asserts (Br. 6, n. 3) that "MRO also inappropriately relies on the FCC's decision of AT&T's "Call Count" feature in the Dial-It decision (Pet. at 6-7)." AT&T is wrong because the FCC in analyzing AT&T's Call Count feature applied the FCC's Dial-It standard for determining whether a service (such as the Call Count feature) is part of tariffed services.

[6]AT&T asserts (Br. 7)that "MRO does not complain that AT&T failed to provide it with call detail sufficient under the Tariff for transport services".

First, AT&T erroneously states that it supplied MRO (rather

AT&T doesn't deny that (1) none of the undisputed differentiating facts (presented by MRO in its Opposition to AT&T's Motion for Summary Judgment, Pet. at 61a-62a) between Dial-It and this Case were even mentioned by the district court in its one sentence conclusion that Dial-It is controlling (Pet. at 39a) and (2) Dial-It, was not a case, such as here, where the IP had to have the call data in order to be able to bill its 900 calls.

AT&T does not deny that the Ninth Circuit's Memorandum did not address these specific issues. Instead, AT&T asserts (Br. 5-6) that the FCC's decisions in Dial-It supra, In re Audio Communications, 8 F.C.C.R. 8697 (1993), and In re Paul Ondulich 5 F.C.C.R. 3190 (1990) permit AT&T's 900 billing and collection services to be untariffed.

However, the FCC's Dial-It holding, that AT&T's billing and collection services in that case, were not subject to tariff, was based on the factual foundation that AT&T's 900 billing services in that case were not tied to AT&T's 900 tariffed services for the same 900 telephone numbers, as they are in this case. Specifically, in this case, once AT&T ceases billing and collection services for an IP's particular 900 number, AT&T refuses to thereafter provide transport services to the IP for that same 900 number.[7]

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than AT&T itself) with call detail for transport services.

Second, MRO repeatedly complains hereinabove that in this case the call detail is part of AT&T's tariffed transport services required to be supplied to MRO (or its agent ITA) pursuant to (1) AT&T's Tariff Section 5.4.4., (2) the FCC's Dial-It standard for determining what services must be tariffed, and (3) the FCA.

[7]Because of AT&T's "tying" provisions, AT&T's 900 BSA IP's must use AT&T's transport services; then if the BSA is terminated by either party, for any reason whatsoever, the IP loses its unique 900 numbers. Once an IP uses AT&T's 900 billing services, the IP must continue to use AT&T 900 transport services or lose its unique 900 numbers; in which the IP typically will have invested substantial advertising sums. The effects of these provisions in the AT&T's BSA are to "tie" AT&T's billing services to AT&T transport services for the same 900 number, and to prevent AT&T's

In Dial-It, supra, the FCC stated in par. 25 at 3432:

> "AT&T asserts that sponsor or subscribers are not required to take Premium Billing as a concomitant to tariffed Dial-It 900 services and indeed, tariffed service subscribers are not 'entitled' to receive Premium Billing service. Instead, they are separate services."

Likewise, the FCC's Audio Communications decision referred to by AT&T (Br. 6) was also based on the fact that when Sprint ceased providing billing services for a particular 900 number, they continued to provide transport services for that 900 number. Or as the FCC stated in par. 6 of its decision:

> "Sprint Telemedia continues to offer 900 transmission service on acommon carrier basis, but without billing and collection for all interested IP's." (Emphasis added.)

Thus, Sprint did not "tie" its 900 billing services to its 900 transport services for a particular 900 number, as does AT&T. In this Case (Unlike the Dial-It and Audio communications cases[8]), AT&T's 900 billing services are inextricably "tied" to AT&T's 900 transport services for the

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IP's from utilizing billing services of AT&T's competitors.

[8]In re Paul Ondulich v. AT&T Communications, Inc., 5 F.C.C. Rcd. No. 11 (1990) cited by AT&T (Br. 6) is also distinguishable because there was no tie in that case between tariffed transport services and nontariffed billing services; since the 900 service there was a nontariffed Call Count service, not a tariffed communication service. Indeed, the F.C.C.'s decision in Dial-It expressly distinguishes Call Count service from the information services in the case at bar. "A Call Count service sponsor / subscriber does not seek a transmission path from AT&T in order to provide, e.g., an information service to his customers. Rather, the Call Count sponsor / subscriber obtains that service only in order to obtain substantive information from AT&T, for example, how many callers have voted 'yes' or 'no' ". 4 F.C.C. Rcd. No. 9 at 3431.

same 900 numbers.[9] The FCC's strong opposition to any such tying practices has been stated in In the Matter of Competition in the Interstate Interexchange Marketplace, FCC Docket No. 90-132 (1992) as follows:

> "We conclude, first, that until 800 number portability is available, future bundling by AT&T of any service with 800 or inbound service using 'old' 800 numbers (800 numbers that were in use by the customer on the day prior to the release of this order) is an unlawful practice under §§ 201(b) of the Communications Act." FCC Rcd. No. 9, p. 2677.
>
> The Commission's rationale was that:
>
> "Because of concerns that bundling of 800 services by AT&T could lead to anticompetitive leveraging, thereby harming competition for other services, we prohibited AT&T from including 800 or inbound services in contract-based tariffs or Tariff 12 integrated services packages until 800 numbers become portable." 7 FCC Rcd. No. 9, p. 2678.
>
> More specifically, the Commission concluded:
>
> "We have found that leveraging is a significant risk with respect to'captive' 800 service customers - customers that are unable to change their800 number without incurring substantial costs." 7 FCC Rcd. No. 9, p. 2680.

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[9]AT&T asserts (Br. 7) that the "... reason that (the FCC has refused to assume any regulatory authority over the billing services [is] because there was and is available competition..." In fact, the critical reason that the FCC relied on in AT&T's cited cases was that there was no "tie" in those cases between the nontariffed billing services and the tariffed transport services; as there is in this case.

II. BY HOLDING THAT MRO CANNOT RECOVER ITS DAMAGES UNDER THE FCA FOR AT&T'S REFUSAL TO PROVIDE THE 900 CALL DATA NEEDED TO BILL ITS CALLERS, THE NINTH CIRCUIT'S DECISION IS CONTRARY TO THE DECISION OF THIS COURT IN MAISLIN INDUSTRIES V. PRIMARY STEEL, 497 U.S. 116 (1990), AND ALSO CONFLICTS WITH §§ 201-202, 206-207 OF THE FCA.

AT&T doesn't deny that under Maislin's "filed tariff" doctrine and §§206-207 of the FCA a customer can sue a carrier if the customer (e.g., MRO) overpaid, the tariff is unreasonable, or the tariff (or its application) is discriminatory.

In its First Counterclaim against AT&T, MRO is suing AT&T to "recover reparation[s]"in the words of Maislin, or damages for AT&T's violations of their Tariff and/or the FCA, as MRO is entitled to do under 47 U.S.C. §§ 206-207.

For the above reasons, AT&T's failure to provide MRO's 900 call detail violates (1) § 5.4.4. of AT&T's Tariff and (2) the unjust, unreasonable and discrimination provisions of the FCA (§§201-202)especially because AT&T, by not providing 900 call detail records for MRO, had selectively discriminated against MRO, compared to other 900 transport services customers (Pet at 63a).

III. THE NINTH CIRCUIT'S RULINGS WOULD ENABLE AT&T (THE NATION'S LARGEST COMMUNICATIONS COMMON CARRIER) BY NOT TARIFFING CERTAIN SERVICES (WHICH ARE "CONNECTED" TO AT&T'S TARIFFED "COMMUNICATIONS" SERVICES") TO PREVENT AT&T'S TARIFFED COMMUNICATIONS SERVICES CUSTOMERS FROM UTILIZING SUCH TARIFFED SERVICES, UNLESS THEY AGREED TO AT&T'S CONTRACT TERMS.

Under the Ninth Circuit's holding, if call data such as the calling telephone number, and date and length of call, were matters of mere contract between AT&T and the IP, as opposed to being a required tariffed service under the FCA, then AT&T could prevent any IP from being able to bill its 900 calls received through AT&T's tariffed 900 transport services by simply not agreeing to contract terms. This would give AT&T an even greater "monopoly leveraging" position (in violation of §§201-202 of the FCA) than in In the Matter of Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, (1992) FCC Rcd. No. 9, p. 2677.[10]

IV. THE NINTH CIRCUIT'S DECISION ALSO SUBSTANTIALLY AFFECTS A RULE OF NATIONAL IMPORTANCE; NAMELY, WHAT SERVICES ARE "...FOR OR IN CONNECTION WITH . . . COMMUNICATIONS SERVICES..." PURSUANT TO THE FCA, IN WHICH THERE IS AN OVERRIDING NEED FOR NATIONAL UNIFORMITY.

The Ninth Circuit's decision substantially affects a rule of national importance; namely, what services are "...for, or in connection with.. communications services..." pursuant to the

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[10]AT&T asserts (Br. 9) that "MRO next contends that the Ninth Circuit improperly held that billing services (including the provisions of call detail records) by interexchange carriers like AT&T are not regulated, because the absence of Federal regulation would permit AT&T to simply refuse to provide billing services to certain customers, purportedly giving AT&T "monopoly leveraging position in violation of Sections 201 and 202 of the ...[FCA]. (Pet. at 10-11.) That contention is baseless. The FCC specifically found that there was a highly competitive market for billing services, and therefore there was no reason to subject billing services to the ...[FCA]. Once again, AT&T is wrong because in this case AT&T "tied" its tariffed transport services and its nontariffed billing services. As stated in Section 1. of this Brief, in the FCC's decisions referred to by AT&T there was no "tie" in those cases between the tariffed transport services and the nontariffed billing services; as there is in this case."

FCA[11], in which there is an overriding need for national uniformity.[12]

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari should be granted.

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[11]It is a basic tenet of statutory construction that in interpreting the meaning of the words of a statute, the purpose of the statute is of critical importance (i.e., what "evils" is the statute directed to). The purpose of § 201(b) of the FCA is to protect subscribers from the unrestricted power of a common carrier, by requiring the common carrier's services to be provided to all subscribers on a "just and reasonable" basis. Therefore, the words "for, or in connection with such communications services" in Section 201(b) of the Communications Act, should be interpreted to include AT&T's 900 billing services, which are "tied" to AT&T's tariffed transport services for the same 900 numbers.

[12]AT&T asserts (Br. 10) that "MRO nowhere explains why this issue, which the FCC has determined should be subject to the variety of the marketplace, requires uniformity. Nor does it explain how there is any split or conflicting authority on whether billing services (including call detail) should be subject to the [FCA]...."

First, the FCC has not, and pursuant to the FCA cannot, determine that nontariffed billing services which are "tied" to tariffed transport services "should be subject to the variety of the marketplace". The FCA has determined that if the nontariffed services are "...for, or in connection with.. communications services...", they must be tariffed.

Second, the Ninth Circuit in this case determined this issue contrary to the FCC decisions referred to by AT&T because in those decisions the FCC required that there be no "tie" between tariffed transport services and nontariffed billing services.

Third, the plain language of the FCA is contrary to the Ninth Circuit's decision; especially since AT&T's tariffed services in this case are "tied" to AT&T's nontariffed services.

Fourth, AT&T asserts (Br. 10, n.6) that the cases cited in the Petition (Pet. 11) do not support MRO's argument. In fact those cases do support MRO's argument because they all involved the question of what services are "...for, or in connection with.. communications services..." pursuant to the FCA; in which there is an overriding need for national uniformity.